AMERICAN BAR ASSOCIATION

JULY 1939

JOVRNAL

VOL. XXV No. 7

Annual Meeting at San Francisco to End Active and Successful Association Year

Another Essay Submitted in the Ross Contest for 1939

CHARLES B. STEPHENS

Regional Meeting of Junior Bar Conference at New York Holds Session on World's Fair Grounds

Recent Tendencies in Legal Education and Probable Path of Future Developments

CHARLES H. KINNANE

Review of Recent Supreme Court Decisions—Holdings on Federal Rules of Procedure

Law Lists and the Public Interest: A Problem of Unsuspected Breadth

STANLEY B. HOUCK

Current Legal Literature—Legal Ethics and Professional Discipline

Eight Months Under the New Rules: Conclusions Drawn from the Reported Cases

WALTER L. BROWN

Legal Institutes on the New Rules of Civil Procedure

Two volumes of the proceedings of legal institutes on the subject of the Rules of Civil Procedure for the District Courts of the United States are now available. The Cleveland proceedings contain the rules themselves, the notes of the Advisory Committee, illustrative forms, tables of cross references, bibliography, and comprehensive index. The proceedings of the Washington and the New York Institutes, in one volume, with elimination of material appearing in the Cleveland proceedings, are now available.

These two books published by the American Bar Association contain full discussion of the rules by members of the Advisory Committee which drafted them and by other eminent lawyers, law teachers and jurists. The speakers at these Institutes disclaim any authority to interpret the Rules, but the discussions are illuminative and the answers to questions propounded at the meetings show how most difficulties are removed by reference to applicable rules. The Attorney General of the United States ordered 1,500 copies of each volume and supplied a copy to every federal judge and to the members of the legal staff of the Department of Justice.

SPEAKERS

At the Cleveland Institute

Members of the Advisory Committee:

William D. Mitchell of New York, Chairman
Edgar B. Tolman of Chicago, Secretary
Dean Charles E. Clark of New Haven, Conn., Reporter
Robert G. Dodge of Boston
Prof. Edson R. Sunderland of Ann Arbor, Michigan
Judge George Donworth of Seattle

At the Washington Institute

Members of the Advisory Committee and Other Speakers:

Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Hon. Homer S. Cummings, then Attorney General of the United States
Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia
Hon. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia
Hon. Oscar R. Luhring, Justice, District Court of the United States for the District of Columbia
Hon. W. Calvin Chesnut, Judge of the United States District Court for the District of Maryland
Prof. William W. Dawson of Western Reserve University Law School

At the New York Institute

Members of the Advisory Committee:

William D. Mitchell
Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Prof. Edson R. Sunderland
Robert G. Dodge

Orders are now being taken by the American Bar Association.

AMERICAN BAR ASSOCIATION
1140 North Dearborn, Chicago, Illinois

Please send me immediately: postage prepaid: a copy of the Proceedings of the Cleveland Institute on the Federal Rules, for which I am enclosing (money order) (check) for $3.00 ☐ **check here**

a copy of the Proceedings of the Washington-New York Institute on the Federal Rules, for which I am enclosing (money order) (check) for $2.00 ☐ **check here**

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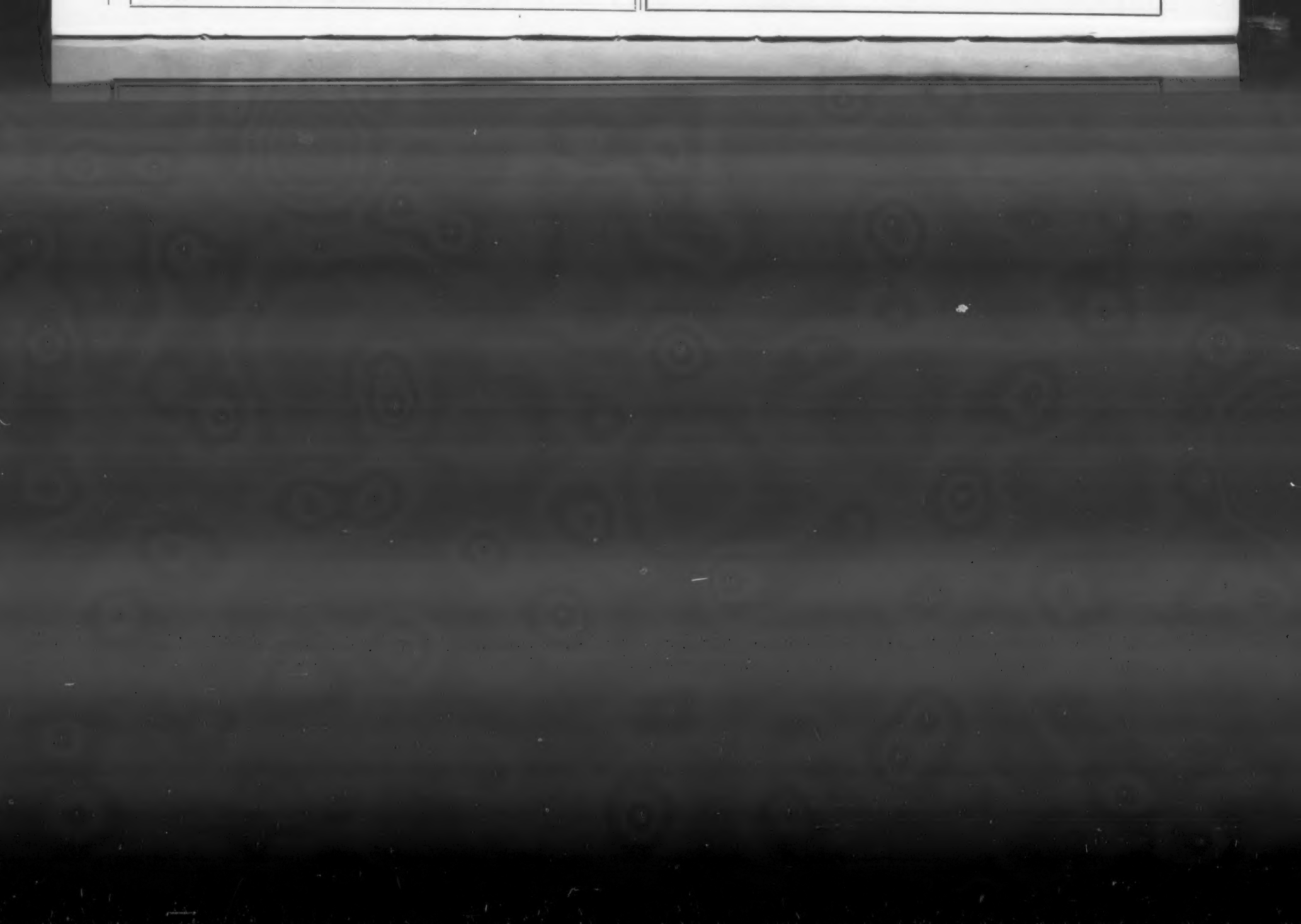

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CURRENT EVENTS

Association Sponsors Patriotic Broadcast

THROUGH the cooperation of the National Broadcasting Company, the major motion picture companies and many of the top-flight motion picture actors and actresses, the American Citizenship Committee of the American Bar Association presented over the National Broadcasting Company Blue Network (WJZ) "America Calling," a nation-wide program on American Citizenship on Flag Day, June 14, from 9:00 to 9:45 P. M. E. D. S. T.

The program opened with the singing of "God Bless America," following which a tribute was paid to Flag Day by Lionel Barrymore. Don Ameche acted as master of ceremonies. Meredith Wilson's orchestra of seventy-five pieces handled the orchestral arrangements and Max Teer's singing ensemble, supported by Connie Boswell, handled the singing background. A medley of American songs, depicting the red, white and blue, was played by the orchestra—red was illustrated in MacDowell's "To a Wild Rose," white was represented by the cotton fields in Stephen Foster's "My Old Kentucky Home," and the medley ended with George Gershwin's well-known "Rhapsody in Blue."

Among the outstanding features of the program was a dramatic sketch written especially for this broadcast by Rupert Hughes, entitled "The Right to Happiness," the characters in which were portrayed by Tyrone Power, Pat O'Brien, Joel McCrae, Beulah Bondi, John Carradine, John Lytel, and others.

During the course of the broadcast Hon. Frank J. Hogan, President of the American Bar Association, delivered a short address on the subject "The American Flag as the Symbol of Civil Liberties Enjoyed by American Citizens."

The broadcast closed with the mass singing of "The Star Spangled Banner."

This program climaxed a year of intensive work on the part of the American Citizenship Committee of the American Bar Association in bringing to the people of the United States a realization of all of the rights and privileges enjoyed by them as citizens, and to others who live within our shores who are not citizens a better understanding of the American system of government. It is the belief of the committee that the program presented on Flag Day was timely and will be of considerable value as a further contribution by the American Bar Association to the public interest.

The program was arranged by Ralph R. Quillian, of Atlanta, Georgia, chairman of the American Citizenship Committee; Grant Cooper, of Los Angeles, California, and Robert Granville Burke, of New York City.

Problems Presented to French Lawyers at Annual Meeting

THE Eighteenth Annual Meeting of the "Association Nationale des Avocats Français" was held in Lyons, May 18-21, 1939, with the Minister of Justice, Mr. Paul Marchandeau, presiding at the opening session.

This meeting was held in the large "amphithéâtre" of the Law Department of the University of Lyons, where the National Association was formed in 1921.

Members of the French Bar from every section of France, as well as representatives from Bars of six foreign countries, were present. I had the honor of representing the American lawyers and of transmitting a cable of greeting and goodwill from Mr. Hogan, President of the American Bar Association.

The most important matters which came before the Association for discussion were the following:

(1) The right of persons, not members of the French Bar (that is not lawyers), to represent litigants under powers of attorney in certain French trials and investigations. The sentiment of the delegates was contrary to the continuance of this practice.

(2) Association or partnership among lawyers: Ancient rules of ethics forbid association or partnership among French lawyers. Recently there has been a change of sentiment in reference to this and debates in favor and against the proposition were most interesting.

No decision was had and the matter was continued for the next annual meeting.

(3) Adoption of rules of ethics to prevent personal influence between lawyers and the heads of various administrations.

(4) Improvement of the plan of furnishing legal assistance to litigants who cannot afford to employ Counsel.

(5) A plan for the establishment of annuity payments to all lawyers after they have reached a certain age having practised a certain number of years at the Bar.

The above constitute the most important questions which were discussed at the regular sessions.

In addition to this, I should call attention to the interesting addresses which were made at formal luncheons and dinners to which all of the delegates were invited.

On St. Yves's day, a mass was celebrated in the Cathedral in honor of the Patron Saint of lawyers and Cardinal Gerlier, Archbishop of Lyons, Primate of the Gauls and himself at one time a member of the Bar, made a brilliant plea for the lawyers in all lands to follow the lead of St. Yves in the administration of justice to all.

At the closing banquet, speeches were made by the Minister of Justice, M. Edouard Herriot, President of the Chamber of Deputies and Mayor of Lyons, the Bâtonnier Fernand Payen, President of the "Association Nationale des Avocats Français," and the Bâtonnier Damiron, of the Bar of Lyons.

PENDLETON BECKLEY.

Paris, June 6.

Annual Review of Legal Education for 1938

THE Annual Review of Legal Education for 1938, just published by the Association's Section of Legal Education and Admissions to the Bar, indicates that further substantial progress has been made during the past year in the raising of bar admission standards.

Since the publication of the previous Review, five states have raised their requirements to the two-year college standard, leaving only eight, all in the South, where a high school education, or in the case of Arkansas and Georgia no education at all, is sufficient to qualify for taking the bar examinations. The states still having these primitive standards are Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma and South Carolina.

The most important change of the year was the adoption of higher standards by the District of Columbia where 13% of the total law school enrollment for the entire country is located. Action by the United States Court of Appeals was followed by a rule promulgated by the District Court of the United States for the District of Columbia, which adopted rules effective in the fall of 1944 requiring two years of college work or its equivalent, which may be certified by the Committee of Bar Examiners and graduation from a law school approved by the Court. Tennessee adopted a two-year requirement by rule of court as did Iowa, while both South Dakota and Maryland followed the legislative route.

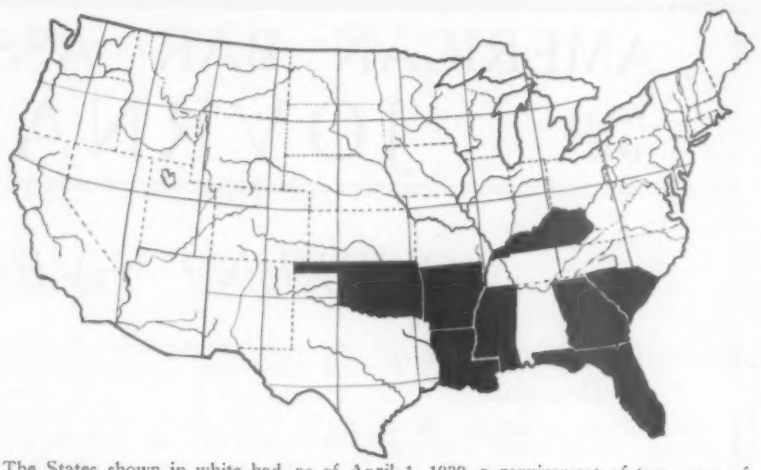
The Annual Review shows the law school enrollment for the year is down from 39,255 last year to 37,406 at the beginning of the present school year. The number of law schools is 180, five less than last year, and of these 101 are approved by the American Bar Association. These approved schools contain about two-thirds of the entire law school enrollment of the country.

Two more schools have gone on a degree basis for admission making nine now in this class while there are thirty-two schools which demand three years of college for entrance. Only thirty, or one-sixth of the total, now require less than two years of college. Substantial decreases in law school enrollment occurred in Massachusetts and New York, in each case about 500, while the District of Columbia added to its last year's figure by 183. The first year class in all law schools decreased some 1500 from the fall enrollment in 1937, indicating the presence of a declining trend in enrollment.

A short summary of the Section's work on advanced legal education is given in the following words:

"A very important development in the work of the Section of Legal Education has occurred in the field of so-called 'advanced legal education.' On the direction of the American Bar Association, the Council has undertaken to stimulate the setting up of legal institutes for practicing lawyers. At the Cleveland meeting of the American Bar Association in the summer of 1938, such an institute on the subject of the new Federal Rules of Civil Procedure was held and there was an attendance of about five hundred lawyers. A subsequent institute on the same subject in Washington, D. C., organized by the Section, had the amazing enrollment of over a thousand. Following these demonstrations of what could be done, institutes on the same topic were held in all parts of the country under the auspices of state and local bar associations. The total number of city institutes since the summer of 1938 is in the neighborhood of sixty.

"Meanwhile a development of equal importance has been going forward in the establishment of institutes for the smaller local bars. Iowa has pioneered in this development and has used it very successfully as a tool for the organization of local and district bar associations. In Colorado, California and Nebraska considerable progress has been made along similar lines under the auspices of the state bar associations, and regional meetings for like purposes are also reported from Wisconsin, Ohio, Pennsylvania, and New York. North Dakota, Vermont and New Hampshire are also to be listed as having made some headway on this program. It has been thoroughly demonstrated that a state bar association, which will provide a list of available speakers and arrange district institutes in cooperation with the local bars, can successfully arouse an interest in bar organization on the part of the practicing lawyers. In view of the evident necessity for a more effective organization of the legal profession, this movement is regarded by the Section as one of major importance."



The States shown in white had, as of April 1, 1939, a requirement of two years of college or its equivalent before bar admission, effective now or prospectively.

The Review gives the usual detailed information concerning each law school, including fees, attendance, admission requirements, length of course, and average number of hours of classroom work. It also has a most useful table showing the admission requirements in each state. Copies of it may be had without cost on request to American Bar Association headquarters.

Colorado Legal Institute Aid to Bar Organization

NO STATE Bar Association has initiated a program for legal institutes throughout the state with more enthusiasm than Colorado. A report just received from an institute for lawyers of the Western Slope in that state, held in Grand Junction on April 15, indicates that this is having its effect in promoting bar organization. The institute at Grand Junction was attended by more than 50% of the lawyers in 15 widely scattered counties in western Colorado. Representatives of 4 counties present decided to form an organization to affiliate with the Colorado Bar Association and the plans were formulated and a committee appointed for this purpose.

The meeting started in the afternoon with an address by Mortimer Stone of Ft. Collins, former president of the Colorado Bar Association, on the subject "Contracts for the Sale of Real Estate." A mimeographed outline of points which should not be overlooked in the preparation of such contracts was distributed to those present. Mr. Far-

rington R. Carpenter of Hayden, Colorado, former head of the Division of Grazing of the U. S. Department of the Interior, was the next speaker on the subject of "The Growth of the Various Grazing Laws and the Reasons for the Interpretations Given Them by the Department."

After a 6:30 dinner, the toastmaster, Mr. Charles M. Holmes, president of the Mesa County Bar Association, introduced Mr. Max Melville of Denver who spoke on "The Unlawful Practice of the Law." Mr. William R. Kelly, president-elect of the Colorado Bar Association, brought the greetings of that body. The meeting was arranged by the Mesa County Bar Association's Committee on Legal Institutes, consisting of Silmon Smith, E. B. Adams and William Weiser, all of Grand Junction.

New York Court of Appeals Recognizes Practising Law Institute—Summer School

THE New York Court of Appeals recently recognized the value of the courses for young lawyers conducted by the Institute in the Spring and Fall Semesters by amending its rules governing admissions to the bar so as to provide that a year's attendance at the Institute's evening courses will constitute a substitute for the service of a clerkship.

An outstanding program has been arranged by this Institute for its Summer Session to be held from July 17th to 28th at the Hotel Astor in New York City. Courses for practicing lawyers will be given in thirteen different subjects. A two hour session in each subject will be given daily. Classes are held in comfortable, air conditioned rooms and will be attended by mature attorneys coming from all parts of this country.

An outstanding program will be offered in income taxation, consisting of three different courses. From 9 to 11 A. M. there will be a lecture series on Fundamentals of Income Tax; from 11 to 1 P. M. a course on Practice and Procedure in Tax Matters and in the evenings from 8 to 10 P. M. an advanced series of lectures on Current Problems in Taxation by ten outstanding tax experts.

Other courses deal with Real Estate (9:30 to 11 A. M.); a lecture series on Trials (11 A. M. to 1 P. M.); Trials Clinic, in which the participants try cases under expert guidance (2 to 5 P. M.); a course on Labor Law (5 to 7 P. M.); and a series of lectures on various phases of general practice, during the evenings from 8 to 10 P. M. In addition, a course on Bankruptcy and Reorganization is offered from 2 to 4 P. M., Corporate Practice from 4 to 5:30 P. M., and a course on Accountancy for Lawyers from 5:30 to 7 P. M.

In the field of public law, practical courses for district attorneys and lawyers who represent municipalities will be given. Each of these courses meets from 10 A. M. to 1 P. M. and from 2:30 to 5 P. M. Among the lecturers in the course on Representing Municipalities are William C. Chanler, Corporation Counsel, New York City; David Diamond, Corporation Counsel, Buffalo; James C. Tormey, Corporation Counsel, Syracuse; William H. Emerson, Corporation Counsel, Rochester, and other experts on municipal law. Municipal finances will be discussed by Arnold Frye, Russell McInnes and George Xanthaky.

Lecturers in the course for district attorneys include Prof. Jerome Michael of Columbia University, Alexander Holtzoff, Special Assistant to the U. S. Attorney General, Judge Rosalie Loew Whitney, William B. Herlands, Commissioner of Investigation and formerly a member of Dewey's staff, as well as various county and federal prosecuting attorneys. A novel feature of this course is the demonstration of laboratory techniques employed in the detection of crime. Eight experts of the New York Police Department and three physicians attached to the Medical Examiner's office of New York City will lecture. Other lecturers include Albert D. Osborn, handwriting expert; Jerome A. Walsh, probation officer; David Marcus, prison administrator; and Harry C. Kane of the Citizens Committee on the Control of Crime.

Other prominent lecturers at the Summer Session include Prof. Thomas Reed Powell of Harvard Law School, Prof. Milton Handler of Columbia Law School, Prof. Garrard Glenn of the University of Virginia Law School.

Classes will be held daily during the two weeks commencing July 17th. The program has been so arranged that at each hour of the day four different courses are going on—thus permitting those attending to choose the subjects in which they are most interested. Emphasis in these courses is on the tactics and technique to be employed by the practicing attorney rather than on legal theory. A tuition fee of $60 permits attendance at all of the courses.

The Practicing Law Institute, under whose auspices this summer school is conducted, is a non-profit educational institution now permanently chartered by the Board of Regents of the University of the State of New York, of which Arthur A. Ballantine is President and Harold P. Seligson, Director.

A detailed schedule of the various courses may be obtained from the Practicing Law Institute, 150 Broadway, New York City.

Nebraska Supreme Court to Make General Rules of Practice

A NEBRASKA Bar Association bill authorizing the Supreme Court of Nebraska to make general rules of practice and procedure was passed by the Legislature and signed by the Governor on June 5. The first two actions are as follows:

"Section 1. To promote the effectual administration of justice and the prompt disposition of judicial proceedings, the Supreme Court of the state shall have power and it is hereby directed to promulgate general rules of practice and procedure for all courts, uniform as to each class of courts, together with forms of pleadings, process, writs, motions, demurrers, rules for admission and exclusion of evidence, the taking of depositions, and all other matters incident to the practice and procedure in civil actions at law and in equity. Said rules shall neither destroy, injure, abridge, enlarge, nor modify the substantive rights of any litigant.

"Sec. 2. The court may at any time unite the general rules prescribed by it, for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* that in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the United States Constitution and Article 1, Section 6 of the Constitution of Nebraska, shall be preserved to the parties inviolate."

Further sections provide that the rules shall not take effect until they are reported to the Legislature at the beginning of a regular session and until ninety days after adjournment of said session. The Supreme Court may change, modify or amend the rules but such changes must be reported as above and do not take effect until ninety days after the session's adjournment. All acts and parts of acts in conflict with the rules as adopted are declared to be of "no further force and effect." A section providing that "this Act shall not prevent the practice before the Nebraska State Railway Commission of any person in his own behalf or in behalf of any class of persons similarly situated," was tacked on during the closing days of the session by a lay

member of the legislature. However, the time was so short that the Bar Association representatives did not feel it advisable to endanger the whole measure by endeavoring to have this section struck out.

Cooperation Between Medical and Legal Professions

AN INTERESTING and successful effort at cooperation between the medical and legal professions is dealt with in the following recent report of Chairman W. E. Rumble of the Minnesota Bar Association's Committee on Cooperation with the Minnesota Medical Association.

"Approximately two years ago this Committee was appointed by the Minnesota State Bar Association and a similar committee by the Minnesota State Medical Association. Since that time the committees have held about eight joint meetings. The two committees have concerned themselves with the following among other matters:

"(a) Discussions of all problems affecting both associations and obtaining information regarding the existence, character, and seriousness of mutual problems. For example, doctors complain of mistreatment by lawyers while giving testimony. This problem has been handled by obtaining from the complaining doctor the name of the case and other identifying information which will permit a transcript of the testimony to be obtained. When the transcript has been obtained, the bar committee considers it and develops whether any misconduct occurred. If a lawyer complains of the testimony of a doctor, the same procedure is followed. The principal effect of this procedure has been to prevent the making of complaints. Apparently both doctors and lawyers have been 'blowing off' about things which never happened.

"(b) Specific instances of testimony by doctors have been discussed by the committees with the view of having the Medical Profession 'tone up' or otherwise exercise some control over the extremes to which plaintiffs' or defendants' witnesses may go. The position of the Bar Committee has been that the Medical Profession ought to assume responsibility for narrowing the area in which legitimate differences of opinion can properly be expressed and that that profession should undertake to hold its members within that area. In many cases it is felt that existing differences of opinion are not warranted.

"(c) Alliances, joint adventures, etc., between doctors, lawyers, hospitals and lawyers, etc., have been analyzed, discussed, and dealt with with the objective of eliminating all conduct which may be subversive of the public interest. There are many instances of misconduct within this general category. Constant policing seems to be necessary. There are many reasons why conduct of this sort will be very difficult to suppress, if in fact suppression is possible.

"(d) Instances in which doctors have engaged in unauthorized practice of the law by attempting to handle claims of their patients for Workmen's Compensation or for other forms of personal injury have also been dealt with and the doctor's continuances of his unlawful conduct stopped.

"In addition, of course, the committees have dealt generally with the question of improvement in the presentation of expert medical testimony. The committees have hoped to arrive at some constructive suggestion which will be practical for application in Minnesota. However, the discussions are still going on and nothing definite has been concluded as yet.

"Early this year it was decided to hold in various sections of the State joint meetings of the doctors, lawyers and dentists of the section, for the purpose of discussing problems affecting the three professions. It was determined to hold the first of such meetings in Saint Paul. That meeting was held in March of this year. All of the members of the Ramsey County Bar Association, Ramsey County Medical Association, and Saint Paul Dental Society were invited. There was a large attendance. A dinner was served and then the meeting was addressed by Dr. Adson of Rochester, and Stanley Houck of Minneapolis, who were each limited to thirty minutes. The result was a successful and interesting meeting."

Applications Before Law List Committee

THE Special Committee on Law Lists has the following applications for approval pending before it. The Committee will appreciate any information, with respect to any or all of these law lists, which members of the Association may be in a position to supply. Such information will be treated as confidential. Letters should be addressed to the Committee at 209 South LaSalle St., Chicago, Ill.

Publication — (Proposed) National Underwriters' Blue Book of Insurance Counsel.

Publisher — The National Underwriter Company, Chicago, Illinois.

Personnel—John F. Wohlgemuth, President and Howard J. Burridge, Vice-President.

Publication—Bankers Law Register.

Publisher—Thomas Ashwell & Co., New York City.

Personnel—Thomas W. Ashwell.

Publication—The Solicitors' Diary.

Publisher—Waterlow & Sons, Ltd., London.

Publication — Recommended Attorneys and Credit Executives' Guide.

Publisher—Central Guarantee Company, Inc., Chicago, Illinois.

Personnel—S. W. Andersen, President.

President Hogan Goes Hollywood. Left to right: Walter Wanger, Frank J. Hogan, Gary Cooper.

SELECTED ESSAYS SUBMITTED IN 1939 ROSS ESSAY CONTEST: A SYMPOSIUM

SUBJECT: "TO WHAT EXTENT SHOULD THE DECISIONS OF ADMINISTRATIVE BODIES BE REVIEWABLE BY THE COURTS?*

ESSAY SUBMITTED BY MR. CHARLES B. STEPHENS OF THE SPRINGFIELD, ILL., BAR

I

THE thoughtful American citizen who is versed in the history of his country and conscious of the fundamental changes that have taken place in the social and economic life of the nation during the past fifty years does not deny the necessity and wisdom of emphasis on the administrative processes of government.[1] He recognizes that the effectiveness of the American system rests upon the equitable balance between individual freedom and collective security, and that his own liberty depends upon a decent and wholesome respect for the rights of his fellow citizens. For that reason he is willing to concede the sacrifice of many of his precious rights to the preservation of general order and welfare.[2]

But recent events in other lands have served to warn him that the balance between individual freedom and collective security is a delicate adjustment in the swift-moving currents of modern life. Press, radio, and the newsreel have brought home to him the ruthless power of administrative absolutism. The crimes that in the past have profaned the sacred name of Liberty pale to insignificance in the blood-red flames that today annihilate liberty, itself, in the name of collective security.[3]

So when the merchant who enters into a contract to purchase merchandise from a distributor in an adjoining state discovers that he runs the risk of severe penalties unless he first makes inquiry as to the wages and hours of labor not only of the distributor with whom he deals but also of the manufacturer and the producer of the raw materials[4]—when the farmer learns that he must sow his fields in accordance with blueprints drawn for him by administrative officials of his government[5]—when the skilled workman is told that an agency of the national government has permitted the will of fellow employees with whom he is not in sympathy to determine the intimate details of his relations with his employer[6]—when the thrifty laborer finds that the price of a much needed loaf of bread has been withheld from his modest pay in obedience to the wishes of his beneficent government[7]—then indeed may the thoughtful citizen pause to consider whether the smug assurance that it can't happen here may suddenly have changed to the awful certainty that it *can* happen here!

Then, too, may the thoughtful citizen wonder if the traditional balance of his freedom with the security of his fellow men may not be fast approaching the breaking point, and reconsider his traditional safeguards against the happening of such a catastrophe. He may now rejoice that, while he slept on in his innocent dreams of security, the courts of the land continued their watchful vigilance to preserve this balance and place the restraints of reason on the headlong march of executive will.[8] Gratefully may he re-

*EDITOR'S NOTE: As announced in the June issue of the Journal, we publish herewith one of the essays submitted in the Erskine M. Ross Essay Competition—an essay which was not awarded the prize but is deemed to be of a high standard of excellence and effectiveness. In publishing several essays in addition to the winning essay (which was in our June issue), no attempt has been made to select or rate the others in any order of relative merit. They have been selected for the reason that they are deemed worthy of inclusion in a symposium representative of varying views on the subject. The author of the essay published in this issue is a lawyer engaged in practice in Springfield, Illinois, a son of R. Allan Stephens, who is Secretary of the Illinois Bar Association and Chairman of the American Bar Association Section on Bar Organization Activities.

1. *Cf.* Pound, *An Introduction to the Philosophy of Law* (1922) 135-137; McCarran, *The Growth of Federal Executive Power* (1933) 58 A. B. A. Rep. 268 *et seq.*; Cummings, *Modern Tendencies and the Law* (1933) 58 A. B. A. Rep. 283, at 284-287; and Landis, *The Administrative Process* (1938) 1.

2. Sutherland, *Private Rights and Government Control* (1917) 42 A. B. A. Rep. 197, at 203.

3. *Ibid.*, at 213. See also Cummings, *op. cit.* note 1, at 290.

4. Fair Labor Standards Act of 1938, 29 U. S. C. A. secs. 215(a)(1), 216.

5. Agricultural Adjustment Act of 1938, 7 U. S. C. A. secs. 1312 (tobacco), 1328 (corn), 1333 (wheat), 1343 (cotton), 1352 (rice).

6. National Labor Relations Act, 29 U. S. C. A. secs. 158, 160(a); *National Labor Relations Board v. Pennsylvania Greyhound Lines* (1938) 303 U. S. 261, 82 L. Ed. 831; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938) 303 U. S. 453, 82 L. Ed. 954.

7. Social Security Act, 42 U. S. C. A. sec. 1002: "The tax imposed . . . shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid."

8. *Cf.* Frankfurter, *Foreword* (1938) 47 Yale L. J. 515, at 517: "Administrative law has not come like a thief in the night. It is not an innovation; its general recognition is." As Frankfurter and other writers have pointed out, the courts have been at grips with this problem since 1887 and possibly earlier: Smith, *Civil Liberty in America* (1918) 43 A. B. A. Rep. 209, at 224; Saner, *Governmental Review* (1924) 49 A. B. A. Rep. 127, at 142; Ballantine, *Administrative Agencies and the Law* (1938) 24 A. B. A. Jour. 109, at 109-110; McGuire, *"A Little Practical Value is to be preferred to Theory —Control of Administrative Responsibility"* (1939) 7 Geo. Wash. L. Rev. 304.

call that in the crisis of our recent economic emergency the highest court in the land stood united to protect a hapless poultry dealer from the unwarranted exercise of administrative power.[9]

In the times that are with us and to come, the thoughtful citizen will look more and more to the courts to mark out the limits of administrative and legislative power in American government. In the traditional power of the courts to review the acts of his governors he sees the strongest hope for his continued freedom. In the readjustment and stabilization of the balance of the powers of government—which in its ultimate form is the balance of individual freedom with collective security—he looks for the most reassuring promise that democratic government in America will be strong and flexible enough to meet the test of the times.

II

The inherent authority of the courts to review, within reasonable limitations, the acts and determinations of the legislative and administrative branches of our government looms as a staunch bulwark of individual and collective freedom in the history of the American nation. Stemming from the ancient doctrine of "supremacy of law," it is rooted in the age-old struggle for freedom from the arbitrary oppression of individual will, and draws the sustenance of its power from the deep and vigorous soil of the common law.[10] In the lives of men it has always been realized in the conflict between executive power and a militant people demanding restriction of that power in the protection of its individual and collective rights.[11] We recall King John, the epitome of administrative justice perverted to selfish ends, faced by the barons on the field of Runnymede—later the King against Parliament—the courts of equity, representing the King's conscience, against the courts of justice—and the King against colonists who were to lay down their lives to establish the principle of representative government.[12]

It is pertinent to our times to observe that the resolution of these conflicts has invariably enhanced rather than evirated the powers of the executive to deal wisely and justly with the affairs of governance. Arbitrary and excessive executive power has ever been curbed by the vigilance of the courts of justice, yet the history of Anglo-American law is one of increasing efficiency in the administration of government in those periods when justice has prevailed.[13]

But justice as applied in the courts of law and review is a man-made justice subject to the variations of human nature and human experience. The uncontrolled power of the courts is even more vicious than unrestricted power in an executive because it presumes to act in the name of justice. It is quite as essential that we guard against the mockery of justice that presided in the court of Bloody Jeffries as that we devise protections against executive tyranny.[14]

The first restriction upon the powers of judicial review inherent in our form of government lies in the unique juxtaposition of independent governments drawing their powers from a sovereign people. The powers of the national government are express powers granted by the people of forty-eight different states which in themselves are independent governments whose powers are restricted only as the people have deemed wise and expedient. This concept, inaccurately termed "dual sovereignty," imposes necessary and practical limitations on the powers of review of our state and federal courts, placing broad spheres of governmental activity within the exclusive jurisdiction of each system of courts.[15] Thus the courts of the states are limited in their powers over the activities of the federal government,[16] and there are areas of purely local activity in which the federal judiciary is similarly restricted.[17]

9. *A. L. A. Schechter Poultry Corporation, et al. v. United States of America* (1935) 295 U. S. 495, 79 L. Ed. 1570. It is to be noted that on February 27, 1939, the United States Supreme Court, in the case of *National Labor Relations Board v. Fansteel Metallurgical Corp.* — U. S. —, — L. Ed. —, protected an employer from unlawful seizure and destruction of his property by striking employees during so-called "sit down" strikes, stating with respect to the statute in question: "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the statute to encourage employees to resort to force and violence in defiance of the law of the land."

10. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court." Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States of America* (1936) 298 U. S. 38, at 84, 80 L. Ed. 1033, at 1058. *Cf.* Lord Hewart, *Address* (1927) 52 A. B. A. Rep. 203, at 208: "It is a commonplace to say that the Rule of Law involves at least two things. One is the absence of arbitrary power on the part of the government. The other is equality before the law." See also: Adams, *The Origin of the Common Law* (1924) 34 Yale L. J. 115 *et seq.*; Pound, *Common Law and Legislation* (1908) 21 Harv. L. Rev. 383, at 402 and 406-407; Pope, *The Fundamental Law and the Power of the Courts* (1913) 27 Harv. L. Rev. 45; Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 Harv. L. Rev. 149-185, (1929) *Id.* 365-409, at 409; Clark, *The Supremacy of the Judiciary under the Constitution of the United States*, etc. (1903) 17 Harv. L. Rev. 1, at 18-19; Lord Shaw, *The Widening Range of Law* (1922) 47 A. B. A. Rep. 219, at 234-235.

11. See Pollock, *The Continuity of the Common Law* (1898) 11 Harv. L. Rev. 423, at 428-429; Sims, *The Relation of Constitutional Limitations to the Reform of the Law* (1930) 55 A. B. A. Rep. 196, at 203; McKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?* (1924) 12 Mich. L. Rev. 215; Thorne, *The Constitution and the Courts: A Reëxamination of the Famous Case of Dr. Bonham*, in *The Constitution Reconsidered* (1938), pp. 15-24.

12. Plucknett, *A Concise History of the Common Law* (2d ed. 1936), particularly Book One, Part I, The Crown and the State, pp. 6-75; Jenks, *A Short History of English Law* (1913), p. 39; Beck, *The Higher Law* (1918) 43 A. B. A. Rep. 470, at 480-481.

13. Pound, *op. cit.* note 1, pp. 111-114, 135-139.

14. Modern tests for man-made justice are well stated in terms of the requirements of a judge in Vanderbilt, *The Place of the Administrative Tribunal in Our Legal System* (1938) 24 A. B. A. Jour. 267, at 272-273.

15. See Phillips, *Governmental Powers, State and National* (1938) 36 Mich. L. Rev. 1051; Norton, *National Encroachments and State Aggressions* (1926) 51 A. B. A. Rep. 309; and Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 Yale L. J. 393. That these limits are not precise and subject to variation is developed in Jackson, *The Rise and Fall of Swift v. Tyson* (1938) 24 A. B. A. Jour. 609 *et seq.*

16. Cooley, *A Treatise on Constitutional Limitations* (8th ed. 1927), pp. 38-67, at 64.

17. *Ibid.*, at p. 38. The tendency of federal powers to expand to the detriment of state powers has been noted: Severance, *The Constitution and Individualism* (1922) 47 A. B. A. Rep. 163, at 173; Martin, *The Growing Impotence of the States* (1933) 58 A. B. A. Rep. 222, at 237; Sumners, *Are We Observing the Natural Laws which Govern Governments?* (1932) 57 A. B. A. Rep. 300. The most marked encroachment has taken place in the field of utility regulation: Curtiss, *Federal Encroachment into the Field of Local Regulation* (1928) 53 A. B. A. Rep. 702, at 707; Barnes, *Federal Courts and State Regulation of Utilities Rates* (1934) 43 Yale L. J. 417; Gordon, *Preservation of Balance between Federal and State Powers of Public Utility Regulation* (1922) 47 A. B. A. Rep. 661.

Perhaps more significant is our separation of the powers of government. In erecting the distinct executive, legislative, and judicial branches of governance, we have carried the concept of supremacy of law to its logical conclusion in practical government, and yet in that very act we have placed definite limits on the application of that doctrine, and wisely so.[18] For by separating the powers of government we have denied to the courts those powers that might most easily lead to the perversion of justice in the administration of our government, the power to enact and the power to enforce the laws of the land.[19] More than that, we have denied to the courts the power to dominate legislation and administration through review of their discretionary and purely ministerial acts.[20] There still remains the most essential function of the judiciary, to assure the continuous functioning of government in harmony with the principles of individual freedom and collective security guaranteed by our fundamental laws.[21]

Practice has proved what theory anticipated in the history of American government. As the nation expanded toward the Pacific, as steam transformed a rural nation to one of industry and commerce, the rigid, categorical separation of governmental powers has had to give way as each branch of government took from and gave to the others the necessary strength and flexibility to keep pace with social and economic progress.[22]

Today, with the legislative and administrative branches of government seeking to arrogate to themselves the functions of the judiciary by limiting or even denying judicial review of the judicial acts of their agencies,[23] we face the critical situation that continued infiltration of these powers may result in a unified, centralized government lacking the checks and restraints of our tripartite system. In the power of judicial review we have the means of checking that infiltration before it reaches the limits where it may destroy the balance of powers necessary to meet the changing conditions of the future, yet adequate to protect the fundamental rights of individual liberty and collective welfare. The times challenge us to define those limits before that delicate balance is destroyed and democracy in America is torn asunder in the conflict between anarchy and mob rule.[24]

18. This result is the outgrowth of our separation of judicial and legislative functions as contrasted with the English retention of judicial finality in the legislative Parliament. Similar results may be noted elsewhere: Pope, *op. cit., loc. cit.*, note 10; Pound, *op. cit.*, note 10, at 402, 406-407; Riesenfeld, *The French System of Administrative Justice: A Model for America?* Part III (1938) 18 B. U. L. Rev. 715, at 746-747; Simons, *The Relation of the German Judiciary to the Executive and Legislative Branches of the Government Compared with That of the United States* (1929) 54 A. B. A. Rep. 226.

19. Green, *Separation of Governmental Powers* (1920) 29 Mich. L. Rev. 369, at 372; Plucknett, *op. cit.*, note 12, at pp. 20, 164, 259, 612.

20. *Cf.* Green, *op. cit.*, note 19, at 373-374, 378-382.

21. *Ibid.*, at 393; Cardozo, *The Nature of the Judicial Process* (5th ed. 1925) p. 94.

22. *Cf.* Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System. IV. Federal Courts of Specialized Jurisdiction* (1926) 39 Harv. L. Rev. 587, at 588, 625; Lummus, *Our Heritage of Impartial Justice* (1939) 19 B. U. L. Rev. 2, at 10-11. The suggestion has been made that we are witnessing the rise of a *fourth* branch of government: Berle, *The Expansion of American Administrative Law* (1917) 30 Harv. L. Rev. 430, at 431.

23. See *Report of the Special Committee on Administrative Law* (1934) 59 A. B. A. Rep. 539, at 547-549.

24. *Cf.* Root, *Public Service by the Bar* (1916) 41 A. B. A. Rep. 355, at 369; Beck, *The Future of Democratic Institutions* (1926) 51 A. B. A. Rep. 248.

CHARLES B. STEPHENS

III

In our search for an adequate formula for judicial review of the decisions of administrative tribunals, we have in the history of American government a solid foundation of practical experience on which to build. The marking out of the constitutional limits of the separate branches of government has been a continuous concern of our courts almost since the founding of the Republic.[25] We have had long and extensive experience with administrative regulation by state and national governments.[26] We have proved that legislative and administrative tribunals can function efficiently as independent adjudicating agencies acting with but limited review of their findings in the courts.[27] We have had an abortive experiment with a system of purely administrative review.[28] Through the arduous process of trial and error we have arrived at certain

25. See McGuire, *Federal Administrative Action and Judicial Review* (1936) 22 A. B. A. Jour. 492 *et seq.*

26. The United States Court of Claims was established in 1855, the Interstate Commerce Commission in 1887, the Court of Customs and Patent Appeals in 1909, and the Federal Trade Commission in 1914. The Wisconsin Railroad Commission was established in 1905, and the first workmen's compensation act was that of Wisconsin, in 1911.

27. The Court of Claims, the Court of Customs and Patent Appeals, the Interstate Commerce Commission, the Federal Trade Commission, and the Board of Tax Appeals are notable examples. See Ballantine, *op. cit.*, at note 8, at 111; Hankin, *Conclusiveness of the Federal Trade Commission's Findings as to Facts* (1925) 23 Mich. L. Rev. 233; Tollefson, *Administrative Finality* (1931) 29 Mich. L. Rev. 839; Powell, *Judicial Review of Administrative Action in Immigration Proceedings* (1909) 22 Harv. L. Rev. 360, at 365.

28. For the history of the ill-fated Commerce Court, see Frankfurter, *op. cit.*, note 22, at 594-615.

rough standards that are helpful in guiding the path of judicial review.

With the change of social and economic conditions that have so vitally affected American life, the courts have recognized that limited delegation of powers among the three branches of government is necessary if the doctrine of separation of powers is to continue to meet the needs of a changing order.[29] So the legislative branch may delegate certain of its powers to the executive where necessary to the more efficient operation of government.[30] By providing in these same enactments for judicial review of the acts of administrative agencies, the legislature thereby *enlarges* the powers of the judiciary by delegating to it both legislative and administrative powers.[31] Upon this basis, the legislative branch may mark out the limits within which the courts may exercise these enlarged powers.[32]

Looking first to the federal statutes, we may divide them into the two broad classifications of proprietary and regulatory statutes.[33] In dealing with proprietary functions of government we may expect to find the greatest measure of administrative finality attended by the most restricted scope of judicial review. Thus decisions of the Court of Claims and the Court of Customs and Patent Appeals may be reviewed by way of certiorari to the United States Supreme Court on questions of law only.[34] Here we have tribunals whose findings have the same effect as judgments or decrees of federal courts, and the scope of review is the same as on appeal from judicial decisions.[35]

In the field of regulation, the courts themselves become integral parts of the administrative process where judicial review is provided by statute, and here we may expect to find a broader measure of review. So it is that in these fields we find legislative direction for the review of administrative findings of both fact and law, generally proscribed by restrictions on the scope of review of questions of fact. These limits are marked out in the definitions of the finality that is to attach to the findings of fact made by the administrative agencies, such as that "the findings of the commission as to the facts, if supported by testimony," are "conclusive,"[36] or that "findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."[37]

The multitude and variety of state statutes makes it well-nigh impossible to survey intelligently the entire field. The Committee on Administrative Agencies and Tribunals of the Section of Judicial Administration of the American Bar Association conducted a reasonably exhaustive survey of the judicial review of state administrative agencies in 1938, and arrived at the following general classifications of the scope of judicial review provided by the statutes of the forty-eight states:[38]

> "1. Review on questions of law only, the board's findings of fact being expressly made conclusive by the statute.
>
> "2. Review on questions of law, with sufficient examination of the record made before the board to ascertain whether there is *any* evidence to sustain the findings of fact.
>
> "3. Review of questions of law, coupled with an inquiry as to whether the findings of fact are so far supported by evidence that they would stand if made by a jury in a court of law (the New York rule).
>
> "4. Review of questions of law, together with independent consideration, by the judge, of the evidence in the record made before the board, to ascertain where the weight of the evidence lies. (In this type of review the board's order is often aided by statutory provision that it shall be deemed *prima facie* correct, or shall be upheld unless against the manifest weight of the evidence, or that its unreasonableness or unlawfulness must be established by clear and satisfactory evidence.)
>
> "5. Review of questions of law, together with an examination of the record made before the Board, and the presentation of such additional evidence as the parties may offer, leading to an independent determination of the facts by the trial judge (subject, in some cases, to statutory presumptions such as are mentioned in paragraph 4).
>
> "6. A complete trial *de novo* before the judge alone, without regard to the record made before the board.
>
> "7. A complete trial *de novo* before a jury.[39]
>
> "Roughly speaking, the first three of these types of review may be characterized as a review upon questions of law only (treating a complete lack of supporting evidence as raising a question of law, as is the common-law rule in certiorari); and the last four types may be said to constitute a review of both law and fact."

The Appendix of the Committee's report[40] contains a summary of sample administrative statutes in all the states, a compilation of statutory annotations that indicates a general trend of state legislatures, with the notable exception of the fields of workmen's com-

29. *Buttfield v. Stranahan* (1904) 192 U. S. 470, at 496, 48 L. Ed. 525, 535.

30. *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194, at 214, 56 L. Ed. 729, 737.

31. *Crowell v. Benson* (1932) 285 U. S. 22, 49-62, 76 L. Ed. 612-618.

32. *Cf.* Mr. Justice Brandeis concurring in *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, at 73-74, 80 L. Ed. 1033, 1052, 1053: "That provision does not, in my opinion, permit a district court to set aside an order on the ground that the Secretary erred in making a finding of fact; and the jurisdiction of this Court to review its judgment is necessarily subject to the same limitation."

33. Dickinson classifies the subjects of administrative adjudication as follows: (1) regulation of public callings and businesses affected with a public interest; (2) regulation under the police power, . . . (3) matters as to which the government is a direct party in interest, . . . Dickinson, *Administrative Justice and the Supremacy of Law* (1927) p. 14. The broad classification here used is one of three outlined in Blachly, *Working Papers on Administrative Adjudication* (1938) pp. 5-9.

34. Court of Claims: tit. 28 U. S. Code sec. 288(b); Court of Customs and Patent Appeals: tit. 28 U. S. Code sec. 308.

35. *Ibid.*

36. Federal Trade Commission: tit. 15 U. S. Code sec. 45.

37. Federal Communications Commission: tit. 47 U. S. Code sec. 402(e). See also *Report and Draft of Bill by the Special Committee on Administrative Law* (January, 1939) pp. 42-43 for similar provisions.

38. 63 A. B. A. Rep. 625.

39. The Committee here notes that both extremes of this list have been challenged as a denial of due process, and both sustained by the United States Supreme Court. *Ibid.*

40. 63 A. B. A. Rep. 632-656.

of judicial review could therefore be predicated on the contractual relationship and obligation. Since the Wisconsin act in which this was originated was used as a pattern elsewhere, it explains the restricted review usually accorded in this field. The comparable uniformity in the field of Unemployment Compensation Acts is attributed to the use of the model act framed by the federal Social Security Board. *Ibid.*, 628, 629.

pensation and unemployment compensation,[41] in the direction of providing some measure of judicial review of the findings of fact of administrative agencies, and even in the fields where the scope of review appears to be most limited there is a sizable minority of states in which review on questions of fact is provided.[42]

But the power of judicial review does not depend entirely upon statutory grant, and the provisions of these statutes are but enlargements upon the inherent powers of review. We must look to the courts for guidance in finding that scope of judicial review that is, as Mr. Justice White put it, "the essence of judicial authority."[43]

Cases dealing with the Interstate Commerce Commission are most helpful to this inquiry. Prior to the passage of the Hepburn Act, in 1906, the statutes relating to that Commission provided for judicial review, but the Hepburn amendments removed these provisions from the act.[44] In *Interstate Commerce Commission v. Illinois Central Railroad Company*[45] the United States Supreme Court first faced squarely the issue of marking out the limits of its powers in this situation, and the formula there stated was affirmed and enlarged in *Interstate Commerce Commission v. Union Pacific Railroad Company* as follows:[46]

> ". . . the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law.[47] But questions of fact may be involved in the determinations of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

This formula has since become established as a uniform rule governing review of other federal administrative agencies,[48] as well as for the review of the action of state authorities in both federal[49] and state courts.[50]

More recently the United States Supreme Court has reasserted a measure of judicial review that will provide a further check on legislative and administrative power. In *Morgan v. United States*[51] the Court, in reversing an order of the Secretary of Agriculture on the ground of lack of adequate hearing, stated in its conclusion the standard which it might apply to future review of similar orders:[52]

> "But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect. . . . For, . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Here is frank recognition of the judicial functions of administrative agencies and an equally frank insistence that so long as they assume to perform the ministry of justice, so long must they comport themselves in accordance with the accepted traditions of justice that will be enforced upon them by a vigilant court. This is a realistic and logical point of view that may well underlie the approach to reconciliation of the various formulas for judicial review of administrative decisions that have developed in the experience of American government.[53]

IV

For the past six years the various members of the Special Committee on Administrative Law of the Amer-

41. The Committee observes that the original Workmen's Compensation Acts were purely elective and that elimination

42. Thus in statutes regulating workmen's compensation, 23 states limit judicial review to questions of law; 16 permit review of questions of fact, with 3 states preserving the presumption of correctness of the commission's findings and 4 states providing for jury trial of the facts on review; 1 state provides no judicial review; and in 6 states the subject is handled by the courts throughout and not by an administrative body. In the regulation of unemployment compensation, 32 states confine judicial review to questions of law; 14 permit review of questions of fact, with 1 state providing the presumption in favor of the correctness of the findings; and 1 state makes no provision for judicial review. These statistics are taken from the interesting table showing the scope of judicial review as to the two subjects above mentioned and public utilities, securities, insurance, and income tax, included in the Committee's report. *Ibid.*, 626.

43. *Interstate Commerce Commission v. Illinois Central Railroad Company* (1910) 215 U. S. 452, at 470, 54 L. Ed. 281, 288.

44. *Ibid.*, notes 54 L. Ed. 1585-1588.

45. *Ibid., loc. cit.*, note 43.

46. 222 U. S. 541, at 547; 56 L. Ed. 308, 311.

47. This is essentially the rule as originally stated in *Interstate Commerce Commission v. Illinois Central Railroad Company, loc. cit.*, note 43.

48. *E.g., Radio Commission v. Nelson Bros. Co.* (1933) 289 U. S. 266, at 276, 277, 77 L. Ed. 1166, 1173, 1174; *Kansas City Co. Ry. v. United States* (1913) 231 U. S. 423, at 440, 58 L. Ed. 296, 303; *Swayne & Hoyt v. United States* (1937) 300 U. S. 297, at 303, 304, 81 L. Ed. 659, 664; *Ford Motor Co. v. National Labor Relations Bd.* (1939) 83 L. Ed. 229, at 234, 235; *Federal Trade Commission v. Standard Education Society* (1937) 82 L. Ed. 48, at 50.

49. *E.g., Chicago, M. & St. P. Ry. v. Public Utilities Commission* (1927) 274 U. S. 344, at 351, 71 L. Ed. 1085, 1090; *L. & N. R. R. Co. v. Finn* (1915) 235 U. S. 601, 606, 59 L. Ed. 379, 383.

50. *E.g., Muskogee Gas & Electric Co. v. State* (1920) 81 Okla. 176, 179; *Western Union Telegraph Co. v. Burlington Traction Co.* (1916) 90 Vt. 509; *Chicago Bus Co. v. Chicago Stage Co.* 287 Ill. 320, 329, 333, 336; *State v. Great Northern Railway* (1916) 135 Minn. 19, 22.

51. 82 L. Ed. 757.

52. *Ibid.*, at 762.

53. For other summary studies of the scope of judicial review of the findings of administrative agencies see: Faught, *Judicial Review of Administrative Agencies* (1938) 24 A. B. A. Jour. 897; Levitt, *The Judicial Review of Executive Acts* (1925) 13 Mich. L. Rev. 588; Stason, *Methods of Judicial Relief from Administrative Action* (1938) 24 A. B. A. Jour. 274; Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 Harv. L. Rev. 127; Isaacs, *Judicial Review of Administrative Findings* (1921) 30 Yale L. J. 781; and Barrett, *Tabulation and Analysis of Questionnaires at Cincinnati Conference* (1938) 24 A. B. A. Jour. 288, at 289, 290.

ican Bar Association, outstanding leaders of the bar well acquainted with administrative details of governance and well grounded in the traditions of constitutional law,[54] have devoted no small portion of their efforts to the task of devising a practical formula for the scope of judicial review of the decisions of federal administrative bodies so as to maintain unimpaired the high quality and necessary efficiency of administrative justice[55] and at the same time to preserve the safeguards of our constitutional guaranties. The committee enlisted and received the thoughtful cooperation of other committees of the Association and other organizations,[56] as well as officials of the federal government.[57] At the conclusion of its creative labors, it has presented to the national Congress a concise formula so simple, so understandable, and yet so soundly practical and in accord with American experience that it commends itself to the serious consideration of every member of the bar who appreciates its vital significance.[58]

This formula reads as follows:[59]

> "Any decision or order of any agency or independent agency shall be set aside if it is made to appear (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence, or (3) that the decision or order is not supported by the findings of fact, or (4) that the decision or order was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing, or (5) that the decision or order is beyond the jurisdiction of the agency or independent agency, as the case may be, or (6) that the decision or order infringes the Constitution or statutes of the United States, or (7) that the decision or order is otherwise contrary to law."

This sentence is part of a larger section of the statute proposed, which section provides for uniform appeals from final orders or decisions of administrative agencies to the appropriate Circuit Courts of Appeals, with power in the court to affirm, set aside, or direct modified any such decision or order appealed, or to remand the cause for the taking of further evidence, with appeal to the Supreme Court permitted by way of certiorari or upon certification of questions of law on which the reviewing court is in conflict with courts of similar jurisdiction, and reserving to the Court of Claims its present appellate jurisdiction.[60]

The Committee has said of this section:[61]

> "The purposes of this section are: (1) To provide a uniform procedure of judicial review for all decisions, and orders of administrative boards, whether of intra-agency boards or of independent agencies; (2) To insure by judicial review that administrative quasi-judicial decisions and orders shall remain within the limitations established for them by statutes conforming to the Constitution and to insure that within such limitations there shall be free exercise of administrative discretion, provided a full and fair hearing has been accorded the citizen and provided further that the decision or order shall be in accordance with the law and the facts established by the record; (3) To decentralize the judicial reviews of administrative decisions or orders into the Circuit Courts of Appeal throughout the United States, rather than centralizing them in Washington; and (4) To provide an expeditious method of resolving any conflicts among the reviewing courts so as to provide by final decision of the Supreme Court of the United States that degree of certainty so necessary in the administration of the law. Last, but not least, it is intended by this section to fix responsibility for incompetent, biased, and illegal action so clearly on the administrative officers and employees concerned that the Chief Executive, the Congress, and the press may know exactly the persons involved."

When we appraise the merits of this simple formula, we are impressed at the outset by the fact that it follows the bounds of administrative justice established by the great traditions of our Anglo-American law, particularly as they apply to the liberty and freedom of the individual. Every line rings true with the spirit of a militant people seeking freedom from the arbitrary oppression of unrestricted administration of government. The citizen is assured of his day in court, but more than that is he assured of his day before the administrative tribunal, protected against the unjust prosecution that marks the most serious threat of administrative absolutism.[62]

Every line of the formula rings equally true with the constitutional traditions of our government. The constitutional guaranties of the rights of the individual are preserved in full vigor.[63] The doctrine of separation of powers is reaffirmed in the provisions assuring the finality of administrative decisions when consistent with the Constitution and the statutes and the facts fairly presented on full hearing, balanced against the power of the judiciary to maintain those safe-

54. The Committee was first appointed in 1933, with Louis G. Caldwell as chairman. Mr. Caldwell was succeeded by O. R. McGuire, the incumbent chairman, in 1935, with Roscoe Pound serving as chairman in 1937-1938. Other members of the committee have included: Thomas B. Gay, Felix Frankfurter, Charles B. Rugg, Milton Handler, Monte Appel, Richard Bentley, Julius C. Smith, Ralph M. Hoyt, Kenneth C. Sears, Walter F. Dodd, James R. Garfield, Robert F. Maguire, and Eugene L. Garey.

55. See *Report of the Special Committee on Administrative Law* (1938) 63 A. B. A. Rep. 331, 360, 361.

56. See history of drafting of the bill, in *Report and Draft of Bill by the Special Committee on Administrative Law* (January, 1939) pp. 8-17.

57. *Ibid.* See also the Remarks of Solicitor General Jackson (1939) 25 A. B. A. Jour. 95-97.

58. S. 915, "A Bill to provide for the more expeditious settlement of disputes with the United States, and for other purposes," was introduced in the United States Senate on January 24, 1939. Prior to its introduction, the draft of the bill with slight modifications, had received the approval of the Board of Governors and House of Delegates of the American Bar Association: 25 A. B. A. Jour. 100, 102. A draft of the bill is appended to the Committee report appearing at 63 A. B. A. Rep. 362-368 (1938).

59. S. 915, 76th Cong. 1st Sess., sec. 4(a).

60. It will be noted that no attempt will be made to discuss any of the remaining sections of the bill. Sec. 2 provides for review of rules to be prescribed by administrative agencies, but it is felt that this study should rather be concerned with review of the final orders and decisions of administrative agencies in the exercise of their judicial functions. It should further be noted that sec. 6 of the bill excepts certain agencies and officials from the act.

61. *Op. cit.*, note 56, at p. 38.

62. *Cf.* Landis, *op. cit.*, note 1, at 109-110.

63. *Op. cit.*, note 56, at p. 16; Stone, *The Greatest Function of the Courts* (1932) 57 A. B. A. Rep. 269, 281.

guards of right and justice that must ever dominate the processes of government.[64]

The formula here proposed rests on the solid foundation of practical experience with administrative justice in American government. The requirements of constitutionality, legality, and jurisdiction are those that adhere to the inherent power of the courts to insist that administrative and legislative acts of government remain within these natural limitations,[65] and the requirement of notice and hearing rests on the logical extension of the guarantee of due process of the law recently reasserted by the courts in the exercise of this inherent power.[66] The requirements that the findings of fact be not clearly erroneous, that they be supported by substantial evidence, and that the decision be supported by the findings of fact, are re-echoed in the same or similar language in the many statutes by which the judiciary has been given the administrative power to review the findings of fact made by administrative bodies.[67] So this formula marks no new or radical departure from established practice and precedent in American law and government;[68] it is the crystallization of all that has been tried and found sound and wholesome in our history of administrative justice.[69]

But we cannot look entirely to the past for justification for so significant a statement of limitation of governmental powers. The swift changes of our own generation warn us that even greater alterations in our social and economic structure may be anticipated for the next generation and those to follow. Unless our formula can give us assurance that it can make strong and flexible the administration of government in such eras of change, it will stand as a force for evil, congealing the life blood of administrative justice.[70]

The formula proposed will necessitate the development of uniform procedures for administrative agencies, procedures dealing not only with the method of appeal to the courts, but with the processes of investigation and hearing as well. As uniformity becomes established, standardized techniques will evolve that will enhance the celerity and efficiency with which administrative justice may be dispatched. Uniform methods of proof, simplicity of records and pleadings, these and many other problems that harass the administration of justice in the courts may find their solution in the administrative processes of government.[71]

Retention of judicial review within the limits prescribed by this formula will hold administrative personnel to high standards of conduct, responsibility, and qualification. The complex and technical matters constantly coming before administrative officers will continue to demand the training and qualifications of experts.[72] Trained groups of practitioners will appear in proceedings before these agencies as we now see them in the fields of interstate commerce, internal revenue, and patent law, to add their keen insight and training in the law to the solution of these problems of government.[73] Most important of all, perhaps, the publicity attendant upon judicial review will fix the personal responsibility of the administrative official, adding to the stature of those who best display the character and temperament of administrative justice and revealing nakedly the faults and weaknesses of the incompetent.[74] Just as the process of review has been a vital factor in maintaining the integrity of our judiciary, so it can become a force to establish the integrity and independence of a strong and capable administrative agency.[75]

It may reasonably be expected that the application of this formula for judicial review will have a similar effect upon the quality of administrative justice. For unless administrative justice can meet the competition of established judicial justice by holding itself to equal standards, it will falter and then fail as the people turn once again to their traditional stronghold of justice, the courts.[76] Administrative justice can meet and has met the measure of judicial justice in America,[77] and with the growth of administrative precedent fostered by the stabilizing influence of judicial review, it may hope to command for itself and the many agencies through which it is ministered the respect and confidence that is the heritage of the judiciary.[78]

No less significant will be the effects of the application of this formula in enabling the courts, themselves, to develop an adequate, flexible, and progressive framework of administrative law. Constant contact with the decisions of administrative agencies will arm the courts with sound factual bases for their decisions complemented by the benefits of administrative opinion.[79] The judiciary will gain that well-rounded experience in social and economic questions

64. See McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations* (1934) 20 A. B. A. Jour. 612; Langeluttig, *Constitutional Limitations on Administrative Power of Investigation* (1933) 28 Ill. L. Rev. 508; Pam, *Powers of Regulation Vested in Congress* (1910) 24 Harv. L. Rev. 77; Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 Harv. L. Rev. 153; Jackson, *Utility Regulation and Business Depression* (1931) 56 A. B. A. Rep. 760, at 766-769; Parker, *Is the Constitution Passing?* (1933) 58 A. B. A. Rep. 240, at 242; Pillsbury, *Administrative Tribunals* (1923) 36 Harv. L. Rev. 405, 583, at 409, 583, 587; Ballantine, *op. cit.*, note 8.

65. Wyman, *Jurisdictional Limitations Upon Commissions Action* (1914) 27 Harv. L. Rev. 545; Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation* (1921) 30 Yale L. J. 681; Powell, *State Utilities and the Supreme Court* (1931) 29 Mich. L. Rev. 811, 1001.

66. *Morgan v. United States, loc. cit.* note 51.

67. *Op. cit.*, note 56, at pp. 42-43. Cf. Stephan, *The Extent to which Fact-Finding Boards Should be Bound by Rules of Evidence* (1938) 24 A. B. A. Jour. 630, 637, 665.

68. *Op. cit.*, note 56, at pp. 40-42.

69. *Ibid.*, pp. 16-17.

70. Root, *Public Service by the Bar* (1916) 41 A. B. A. Rep. 355, 369; Pound, *The Administrative Application of Legal Standards* (1919) 44 American B. A. Rep. 445, 458; Green, *The Administrative Process* (1935) 21 A. B. A. Jour. 708 *et seq.*

71. *Cf.* Plucknett, *op. cit.*, note 12, at 160; Stephens, *What Courts Can Learn from Commissions* (1933) 19 A. B. A. Jour. 141; Friedman, *A Word About Commissions* (1912) 25 Harv. L. Rev. 704; Freer, *Practice before the Federal Trade Commission* (1939) 7 Geo. Wash. L. Rev. 283. See *Rules and Regulations of the Secretary of Agriculture* under the Perishable Agricultural Commodities Act for example of simplified procedure that can be worked out in non-commission type of administrative agencies.

72. *Report of the Special Committee on Administrative Law* (1937) 62 A. B. A. Rep. 789, at 823.

73. See *Admission to and Control over Practice Before Federal Administrative Agencies*, Report of Committee on Administrative Practice of the Bar Association of the District of Columbia (November, 1938) pp. 3-12.

74. *Supra* note 61.

75. *Supra* note 27; Frankfurter, *op. cit.*, note 22, at pp. 588, 625.

76. See Plucknett, *op. cit.*, note 12, at pp. 47-48.

77. *Supra* note 27.

78. See Plucknett, *op. cit.*, note 12, at p. 259.

79. The practical effects of this contact may be seen in the development of the ability of courts to deal adequately with the problems of utility rate-making by utilizing the data brought before them for review.

80. Frankfurter, *The Law and the Law Schools* (1915) 40 A. B. A. Rep. 365, at 367.

that will enable it to attune the broad developments of the law to the needs of a changing order.[80] As administrative expertness and sense of justice develops in larger degree, the courts can rely more upon administrative findings of fact and concentrate their own energies on charting the course of the law on the sound bearings of experience and the traditions of the past.[81]

In short, it will enable government—and in that term is included the three branches of our American system—to apply more efficiently the methods of democracy to the solution of the social and economic problems of the times. By stimulating improvement in the methods of administrative investigation, it will make available to all the factual data on which progress must rest, giving judge, administrator, and legislator alike first-hand information of these conditions that cry for relief.[82] It will resolve the conflict between justice and administration, coordinating, without in any way impairing their efficiency or independence, the efforts of the administrator who marshals the facts and applies the law in individual instances with the labors of the jurist who marks out the broad lines of the law to be applied.[83] It will assure rational progress founded on the ideals of democratic justice, with the delicate balance between individual freedom and collective security again restored to equilibrium.

V

We of today stand well within the thresholds of new eras in law and government. That the law is moving away from a period of rigid stability toward a period of greater flexibility is manifest in our concern for simpler judicial procedure.[84] Just as the common law itself emerged from a system of arbitrary administration, so the resurgence of administrative justice has ever paved the way for greater growth in the law when executive power has spent its force.[85] But we must not therefore be lulled into the hopeful notion that history unaided can repeat itself. We must keep ever before us the warning voiced by Mr. Vanderbilt when President of the American Bar Association:[86]

> "There are those . . . who liken these tribunals to the Court of Chancery, the Admiralty, the Council, and the Star Chamber of the sixteenth and seventeenth centuries which evolved from administrative organs into judicial bodies. The same thing, they say, will ultimately happen to our administrative tribunals, so why be concerned? What these people fail to remember is that the Bar of the sixteenth and seventeenth centuries under the leadership of Lord Coke did make these matters its concern, much to the annoyance of the House of Stuarts; if it had not done so, what these people lightly and indifferently term evolution would never have occurred. The administrative tribunals are here and here to stay, because they serve, or can be made to serve useful purposes."

This concern for adaptation of the administrative process to the ideals of law and justice strikes even nearer to the heart of the true American as he sees his government approaching the cross-roads of democracy and absolution and wonders fearfully if democracy can be made to meet the tests of modern times, or whether it is doomed to follow the ancient cycles of governance and sink to chaos and anarchy.[87] This is no idle prophecy of the alarmist but the growing conviction of realists in government who see the hand writing on the wall and know from the history of mankind that the success of democratic government and its greatest strength depend directly on the skill and ability of its people, speaking and acting through their representatives as judges, executives, or legislators, to make the processes of their governance meet the tests of any time or occasion.[88]

The task is one that calls the best that is in all of us to action. No one agency, no single branch of our government can meet alone the challenge of the varied and complex problems of our times and of the future. The courts, by the nature of their inheritance as ministers of justice in its broader applications, must of necessity move slowly and cautiously lest they rend asunder the ideals of impartial justice on which our government rests. The legislative branch can grant the broad powers to act in accordance with the pressing needs of the communal will but it lacks the machinery to apply those powers in the individual instance. The administrator has the flexible power to shape law to meet the individual need, yet lacks the long perspective to harmonize that application of individual justice with the broad principles that underly our democracy. The aggregate of these powers, and the preservation of their independence within the delicate balance of our government, are the factors that have protected individual freedom and collective security in the past, and they must be maintained to continue that protection for the future.

As officers of the courts—as members of legislative bodies—as executives in the ministry of governance—it is the glorious privilege and awe-inspiring tradition of the bar to stand in the front ranks of those who must meet and solve these difficult problems. In the words of President Hogan:[89]

> "We are at death grips in America with this age-old problem of government. Progress, gratifying progress, has been made. Let us tighten our hold and go on until the history of our time will record as its greatest achievement *Justice, Sure and Speedy, for All.*"

81. *Cf. supra* note 27.
82. McGuire, *Sailing Close to the Wind* (1936) 22 A.B.A. Jour. 853.
83. Green, *op. cit.*, note 70; Frankfurter, *op. cit.*, note 8.
84. Pound, *op. cit.*, note 1, at pp. 135-136; Pound, *Law and the Science of Law* (1934) 43 Yale L. J. 525, at 535-536.
85. *Ibid.*
86. Vanderbilt, *United We Stand* (1938) 24 A.B.A. Jour. 597, at 600; also at 63 A. B. A. Rep. 698, 705.
87. Batts, *The New Constitution of the United States* (1919) 44 A.B.A. Rep. 208, at 225.
88. *Cf.* Root, *op. cit.*, note 70; Dickinson, *States and the Nation* (1936) Ill. St. B. A. Rep. 1936, 268, at 269; Landis, *op. cit.* note 1.
89. Hogan, *Justice, Sure and Speedy, for All* (1938) 63 A. B. A. Rep. 743, at 753; also appears under title *Lawyers and the Rights of Citizens* at 24 A. B. A. Jour. 615, 619.

THE ANNUAL MEETING WILL END ACTIVE AND SUCCESSFUL ASSOCIATION YEAR

New Friends and Added Prestige Gained Under President Hogan's Administration—Favorable Reception Accorded Many of the Association's Special Activities — San Francisco to Furnish Attractive Setting—Interesting Personalities of the Meeting—Forums for Practical Help to Average Lawyer—Working Meeting with Lively Debates Forecast

AS this issue of the JOURNAL comes from the presses, many members of the American Bar Association are on their way to San Francisco, from all parts of the country, to take part in the deliberations of the sixty-second annual meeting and enjoy the hospitality of San Francisco and California.

As in the years of other meetings of the West Coast, special trains are carrying congenial groups of lawyers and their families on routes which include leisurely stop-overs at scenic and historical points of interest, with an opportunity for the participants to "see America first" and gain some comprehension of the beauty and the enterprise of the Western scene. The majority of the lawyers attending the meeting will come by regular trains and planes, because of their inability to leave their offices and their work sooner, at the end of June. As in other years, a particularly large attendance of the lawyers from California, Nevada, Utah, Oregon, Washington, Arizona, and other adjacent States, is expected, which will bring the convention attendance close to or above the usual figures for West Coast meetings. Although a San Francisco meeting is far from the centers of population in the country as a whole, a meeting on the West Coast is highly advisable from time to time, as otherwise a large number of lawyers would have no fair opportunity to attend an annual meeting of the American Bar Association.

The Association Year Now Ending

Under the active leadership of President Frank J. Hogan of the District of Columbia, the Association has gained many new friends and much added prestige during the Association year which ends with this meeting. The added strength which has come from the democratic structure of the Association, the impressive work of the House of Delegates as a senate truly representative of the profession of law, and the momentums gained from the Supreme Court fight and last year's program for practical efforts to improve the administration of justice, have been supplemented this year particularly by the favorable reception and wide support given to the Association's well-considered bill in the field of Administrative Law, by the notable activities of the new Committee on the Bill of Rights in defense of constitutional guaranties, and by the Association's forward-looking contributions to the current discussions of amendments to the Wage-and-Hours Act, the National and State Labor Relations Acts, and the Social Security Act, as well as in the field of Federal taxation. Several of the Sections have also produced informative reports of great practical usefulness to their members, and progress has been made in supplying these documents to those members who want and will use them.

San Francisco as Scene of This Meeting

Sessions of the American Bar Association in San Francisco constitute a really distinguished as well as picturesque occasion; and it will be so this year, under the dynamic guidance of President Hogan. Association Headquarters will be at the historic Palace Hotel, with its Palm Court and its Rose Room and admirable facilities for a comfortable meeting. The National Conference of Commissioners on Uniform State Laws will have its headquarters and sessions at the vast Hotel St. Francis, fronting on Union Square.

Several picturesque trips and entertainments, such as only San Francisco and its environs can provide, have been arranged for the visitors. Chief among the attractions will be Treasure Island, with its carnival spirit and noted displays; the California Building at the Exposition will be rendezvous for several gatherings. The Pacific Fleet of about one hundred ships will be at anchor in the great Harbor during the meeting, and the search-light displays will illuminate the beauties of the Golden Gate, Nob Hill, and the Twin Peaks. Visitors will be especially interested in the two famous bridges—the Golden Gate Bridge, which is the longest single-span bridge in the world, with the Redwood Highway opening up picturesque areas to the North, and the graceful new bridge to Treasure Island and Oakland, which is believed to be the longest multiple-span bridge in the world. Many things combine to make San Francisco an attractive setting for this assembly of American lawyers.

Interesting Personalities of the Meeting

This year's meeting will bring together dynamic and engaging personalities from the American scene, although the state of international affairs unfortunately precludes the coming of distinguished jurists from abroad, such as have honored and graced meetings of the Association in less anxious years. R. L. Maitland, K.C., a gifted leader of the Bar of Canada, comes as Delegate of the Bar Association of the Dominion, to which the organized Bar of the States is so closely bound by fraternal ties and common aims. With Stephen Chadwick, Commander of the American Legion, the Honorable Mr. Maitland will speak at the annual dinner Thursday evening.

Most appropriately in a year in which the legislative branch of government has from time to time reasserted its ancient role as defender of cherished American ideals and institutions, the Wednesday evening address will be delivered by Senator James F. Byrne, of South Carolina, an intrepid lawyer who has won increasing recognition for independence as well as leadership in the Senate of the United States. Also on Wednesday evening, an award of the American Bar

Association Medal will be made to a distinguished lawyer whose long service to the Association richly entitles him to this meed of recognition. His identity has not been announced. There will also be interest in the personality of the 1939 winner of the $3,000 Ross Essay Prize, Professor Malcolm McDermott of the Duke University Law School, former President of the Tennessee Bar Association. He will receive his award and make response in the Assembly on Thursday morning.

Official and unofficial Washington will be ably represented, through the presence and participation of Attorney-General Frank Murphy, Solicitor-General Robert H. Jackson, Assistant Attorney-General Thurman Arnold, Chairman Jerome Frank of the Securities and Exchange Commission, Former Attorney-General Homer Cummings, Congressman Walter Chandler, and others who are noted for National leadership.

Forums for Practical Help to the Average Lawyer

The programs of the sessions of the Assembly and the House of Delegates, as well as the many Sections, are replete with features of especial significance and usefulness, with speakers who are recognized authorities in their respective fields. Perhaps chief among these, from the point of view of practical usefulness to the average lawyer under present-day conditions, will be the Assembly's "open forum" as to the preparation and presentation of contested matters under the Labor Relations Acts and the Wage-and-Hours Act. The announced speakers are the Honorable Calvert Magruder, General Counsel for the Wage-and-Hour Administrator, lately appointed a Judge of the United States Circuit Court of Appeals for the First Circuit, and the Honorable Charles Fahy, General Counsel of the National Labor Relations Board, both of whom will endeavor to address their remarks to practical suggestions for the aid of the average lawyer taking up the problems of clients in these new fields of law. There will be an opportunity for questions and discussion from the floor, and a profitable and lively session of the popular Assembly is likely to result. Several of the Sections have scheduled notable and highly useful forums, as will be confirmed from examining their detailed programs as published in the June issue of the JOURNAL. The Section of Judicial Administration will head up a timely and lively forum on State Administrative Law in its many ramifications.

Forecast of a Working Meeting With Lively Debates

High points in interest at the San Francisco meeting will be the debates in sessions of the Assembly and House as to mooted phases of Association policies and affairs. Chairman Grenville Clark will report for the Committee on the Bill of Rights, whose work has been "high-lighted" during this Association year, and a stirring debate is certain to follow. Proposed amendments of the Constitution and By-laws of the Association will open the doors to lively debate, as will the "survey" report of the "Stinchfield Committee," which recommends the abolition of many of the Association's historic and well-known Committees, as well as the creation of an additional Section. Some of the recommendations by Committees and Sections are likely to meet with opposition.

In so far as the charms of San Francisco, the allurements of Treasure Island, and most of all the famed hospitality of California lawyers, will permit, it is assured that Association members who go to San Francisco will enjoy stimulating and significant sessions, devoted in large part to an appropriate consideration of important business of the Association.

National Association of Attorneys-General

Following is the program for the 33rd Annual Meeting of the National Association of Attorneys-General, to be held in Private Dining Room B, Clift Hotel, San Francisco, on Monday and Tuesday, July 10 and 11:

Monday, July 10

9:30 A. M.

Hon. Gaston L. Porterie, Federal District Judge, former Attorney-General of Louisiana, presiding.

Address of Welcome, Hon. Earl Warren, Attorney-General of California.

Response, Hon. Thomas J. Herbert, Attorney-General of Ohio.

President's Address, Hon. Gaston L. Porterie.

Report of the Secretary-Treasurer, Hon. Joseph E. Messerschmidt, Assistant Attorney-General of Wisconsin.

Thirty-six Years as Attorney-General, Hon. U. S. Webb, former Attorney-General of California.

2:00 P. M.

"Federal Acquisition of State Lands Under the Federal Flood Control Act of 1938," Hon. Lawrence C. Jones, Attorney-General of Vermont.

"Trade Barriers, Legal and Economic Aspects," Hon. Greek L. Rice, Attorney-General of Mississippi.

"Interstate Compacts," Hon. Filo Sedillo, Attorney-General of New Mexico.

General Discussion of Addresses.

Appointment of Committees on Nominations and Resolutions.

Tuesday, July 11

9:30 A. M.

"Attorneys-General in Crime Control Cooperation," Judge Richard Hartshorne, President, Interstate Commission on Crime.

"National Parole Problems," Hon. Wayne Morse, Dean of Law of the University of Oregon.

"Motor Vehicle Taxation and Interstate Reciprocity," Hon. John E. Martin, Attorney-General of Wisconsin.

"A National Center for Criminological Research," Hon. John T. Vance, Law Librarian of Congress.

12:30 P. M.

Luncheon for members of the Association as guests of Attorney-General Earl Warren at the Bohemian Club.

2:00 P. M.

"Government Corporations Engaged in Business Within the States, Their Taxation by the State," Hon. William C. Walsh, Attorney-General of Maryland.

"The Federal Government and the States," Hon. Gray Mashburn, Attorney-General of Nevada.

General Discussion of Addresses.

Committee Reports.

Election of Officers.

7:00 P. M.

Subscription Dinner—Delphian Room, Clift Hotel.

"Uniform Rules for Criminal Procedure," Hon. Justin Miller, Justice, United States Court of Appeals.

"Legal and Administrative Changes in Social Security," Hon. Frank Bane, Executive Director, Council of State Governments; former Director, Social Security Board.

Adjournment.

COMMENTS ON PROPOSED AMENDMENTS TO CONSTITUTION AND BY-LAWS

A FEATURE of the 1939 meeting of the Association will be its action upon a number of important amendments to the Constitution and By-laws of the Association as adopted in Boston in 1936. In part these proposals to amend are along lines consistent with the present structure and are designed to clarify or improve existing provisions, in respects suggested by the experience of the past three years. Other proposals would make substantial changes in the representative plan, and are deemed likely to meet with vigorous opposition.

For the adoption of such an amendment, its approval by each the Assembly and the House of Delegates is required. If the Association members present in San Francisco or the delegates constituting the representative body disagree upon a proposed amendment, a mail ballot of the whole membership of the Association determines the fate of the proposal through a referendum.

The various amendments as filed were published in full in the June issue of the JOURNAL (pages 497-499, 534). In this issue the JOURNAL presents a brief analysis of each proposal. If the same is known to be controverted, an indication of the probable arguments pro and con is given, for the information of Association members.

Amendment No. 1, proposed by the members of the House Committee on Rules and Calendar, would amend Article II of the Constitution by including in the specification of persons who are eligible to membership in the Association any who is a member of the Bar "of any Federal, State or Territorial Court of Record." This would eliminate some technical questions of eligibility under the existing wording.

LARGER NUMBER OF ASSEMBLY DELEGATES

Amendments Nos. 2 and 3 have the same sponsorship as No. 1. They would increase the number of delegates elected by the Assembly (the members present at an annual meeting) from five to eight, and lengthen their terms from one to two years. Eight Assembly Delegates would be elected at the 1939 meeting, half of them for a four year term; and their successors would be elected for a two-year term.

These amendments would add four to the membership of the House, and might increase to that extent the cost of its mid-winter meetings. On the other hand, they would give to the Association members who come to the annual meeting an increased representation in the House of Delegates. They would elect four Assembly Delegates a year instead of five, but each Delegate chosen would serve for two years instead of one year.

THE TERMS OF BAR ASSOCIATION DELEGATES

Amendment No. 4, also proposed by Messrs. Crump, Morris, Smith, Wickser and Wheeler, would end the terms of office of all State Bar Association and local Bar Association Delegates with the adjournment of the 1940 meeting, with a proviso that their successors shall be named for two-year terms to expire with the adjournment of the annual meetings in even-numbered years.

At present these Bar Association Delegates serve virtually at the pleasure of their constituencies, and the membership of the House is changing frequently but gradually. The amendment seeks to introduce fixed terms and simultaneous expiration of terms, so that all Bar Association Delegates, about one-third of the House, would go out of office at the same time.

"INDEPENDENT" NOMINATIONS FOR ASSOCIATION OFFICES

Amendment No. 6, which has the same sponsors as the preceding proposals, would reduce the number of Association members required to sign the petition, to make a valid nomination for an Association office. For one of the four general offices, the number of signers of a petition would be reduced from two hundred to one hundred; and for a member of the Board of Governors, the number of signers would be reduced from two hundred to fifty, of whom not more than twenty-five are accredited from one State.

The purpose of the proposal is to make "independent" nominations by petition easier, in the event there is dissatisfaction among members as to a nomination made and filed by the State Delegates. Any objection to this amendment would doubtless be based on a contention that the number at present required can easily be obtained, if there is real dissatisfaction with a nominee of the State Delegates, and that time should not be required to be taken up with candidacies sponsored by only a slight fraction of the Association's 32,000 members.

ELIGIBILITY TO ELECTION TO THE BOARD OF GOVERNORS

Amendment No. 7, again with the same sponsors, would broaden somewhat the existing provisions as to eligibility to election to the Board of Governors. Instead of limiting the choice to members of the House of Delegates, it would open the doors to choosing any person who *has been* a member of the House.

An underlying principle of the Constitution adopted in Boston in 1936 was that the Board of Governors should be and remain virtually the administrative committee and agency of the House, chosen by and from its members and wholly subordinate and responsible to it, and should not be so constituted that it might tend to become a separate and superior governing body, as the old Executive Committee was believed by many to be. The experience gained through membership in the House was also deemed an almost necessary prerequisite to valuable service on the Board of Governors. Thus far the purposes of the present provisions are deemed by their authors to have been admirably fulfilled, but there is a feeling on the part of some members that the Association is too much restricted in its choice of members for the Board of Governors.

The present amendment has as its purpose the preserving of the essential principle on which the present provisions are based, yet at the same time some consistent broadening of the eligibles, through enabling choice also from among *former* members of the House. By some, this proposal will not be deemed to go far enough; by others, it will be deemed to go too far and to endanger a plan which is working well. The proponents say that it goes at least as far as it is prudent to go at this time.

With Amendments No. 6 and 7 should be considered the "Lawther amendments" and the "Ransom amendments," later discussed.

RULES OF PROCEDURE OF THE HOUSE

The same sponsors propose also to amend the House Rules, so as to make the filing of a list of the members of "affiliated organizations" optional with the Committee on Credentials and Admissions, rather than mandatory.

ABOLITION OF COMMITTEES AND TRANSFER OF THEIR FUNCTIONS TO SECTIONS

Messrs. Crump, Morris, Wickser, Smith and Wheeler have filed also, *"without recommendation"* but in order to permit the same to be acted upon at this meeting, various amendments of the By-laws to abolish Standing Committees of the Association and to transfer their functions to existing Sections or, in one instance, to a new Section.

The Standing Committees which would thus be abolished are: Aeronautical Law, American Citizenship, Commerce, Commercial Law and Bankruptcy, Federal Taxation, and Noteworthy Changes in Statute Law.

These changes are being urged on the ground that such Committees have outlived their usefulness and serve no present purpose of the Association, or that their work could be done better if placed within the jurisdiction and control of a Section. The reasons urged in behalf of their abolition and such a transfer of their functions are stated in the "survey report" by the Stinchfield Committee, which is contained in full in the Advance Program pamphlet and should be read, as it seems likely to provoke a lively debate.

The work of most of these Committees, if they are abolished, would be transferred to the new Section of Commercial Law, along with the functions of some Special Committees, including that on Securities Laws and Regulations. If the abolition of the Standing Committee on Federal Taxation is carried, it is proposed to create a new Section, to take charge in that field.

The abolition of these Committees is being strongly opposed, on the grounds that they are historic Committees of the Association, which have rendered, and are from time to time still rendering, distinguished service to the profession. It is urged also that no experience thus far indicates that a Section could deal as well with the special subjects entrusted to these Committees, particularly if such widely different subjects as bankruptcy law, aeronautical law, securities laws, anti-monopoly and fair trade laws, etc., were merged in one Section. The further point is made that Sections function admirably in fields of discussion and in promoting acquaintance among lawyers engaged in a particular branch of the law, but are not suited to the handling of legislation, etc., in behalf of the Association. It is urged that such matters may best be left in the hands of small Committees appointed by and responsible directly to the President and the Board of Governors. By others, it is urged that the creation of additional Sections is highly inadvisable, in the present state of Association finances, and for the further reason that the meetings and work of the Association should not be further divided and sub-divided.

STATE MEMBERSHIP COMMITTEES

As to this matter the 1939 meeting is given a choice of expedients. The creation of autonomous State Committees on Admissions, with "staggered" terms and no duties except to pass on applications, has worked exceedingly well; the State Membership Committees, charged with the duty of soliciting desirable new applications, has not worked out well, in many States. The present mandatory provision for their appointment in every State needlessly encumbers the roster of Committees; they are needed in a relatively few States, if at all.

Frank J. Hogan as an individual member proposes an amendment to abolish them outright. William L. Ransom has filed an amendment to leave the appointment of a Membership Committee in any State optional with the President, if he at any time deems such a Committee needed and likely to be useful in such State. Acrimonious debate as to these alternative proposals is not expected from their proponents.

THE "LAWTHER AMENDMENTS" AS TO THE NOMINATION AND ELECTION OF ASSOCIATION OFFICERS

Former Judge Harry P. Lawther of Texas has filed a revised form of his familiar proposals to change basically the method of nominating and electing the officers of the Association. He proposes:

(1) That the nomination and election of a Chairman of the House of Delegates shall take place in the House, with no advance nominations and no right of Association members to nominate a candidate by petition;

(2) That for other offices and for members of the Board of Governors, the present methods of advance nominations shall or may be followed; but that other nominations may be made from the floor *at the time of election;* and

(3) That in voting for officers and for members of the Board of Governors, the voting in the House shall be by States.

The pros and cons of these proposals have been extensively debated in the Assembly and House, and these discussions have from time to time appeared in the columns of the JOURNAL. Judge Lawther's argument for his proposals has been placed before JOURNAL readers from time to time. His proposals are opposed as involving almost a complete change in the nominating and electoral processes under the present structure, and it is denied that experience has developed any need therefor.

NOMINATION OF CHAIRMAN OF THE HOUSE OF DELEGATES

In order to enable the Assembly and House in San Francisco to decide whether they wish to enable members of the House of Delegates who are not State Delegates to make an "independent" nomination for Chairman of the House, William L. Ransom has filed for consideration an amendment which, in addition to existing modes of nomination (i. e., by the State delegates and by a petition signed by members), would enable also any fifteen members of the House to sign and file a nominating petition making a nomination for the office of Chairman of the House of Delegates. If adopted, this would obviate any claim that the members of the House may not nominate and elect its Chairman; at the same time, it would preserve the advantages of advance nominations and conserve the time of the House for the dispatch of its heavy calendar of business. If urged, this amendment will be opposed by some as an unwarranted and inadvisable departure from the present representative system of nominations and elections.

REGIONAL MEETING OF JUNIOR BAR CONFERENCE HELD IN NEW YORK

Representative Group from States of Second Circuit and Other States of Northeast Gather for Conference and Planning—Opening Session Held in Auditorium of General Motors Building at World's Fair—Interesting Addresses at Main Sessions—Round Tables on Lively Topics—President Hogan Speaks at Banquet, etc.

THE Regional Meeting of the Junior Bar Conference for the Second Federal Judicial Circuit was held in New York City, under the auspices of the American Bar Association, on May 19th and 20th. Owing to the many demands on the time and finances of the younger lawyers at that time of year, the attendance from localities distant from New York was not as large as had been hoped for. Nevertheless, the occasion brought together a fully representative group, not only from New York City, its environs, and the States of the Second Circuit, but also from other States in the Northeast. Opportunity was afforded for a great deal of useful conference and planning, among the younger lawyers; and the addresses attracted a great deal of public attention, in the press and on the radio.

The opening session was held in the beautiful auditorium of the General Motors Building at the New York World's Fair, on Friday morning, May 19th. H. Graham Morrison of New York was in the chair. Despite the many counter-attractions of the Fair, the business of the Conference was transacted; and several thoughtful addresses were heard.

Arthur A. Ballantine Talks of the Lawyer of Tomorrow

After welcoming remarks by Alfred T. White, State Chairman for New York, Chairman Morrison stated forcefully the organization and purpose of the Regional Conference. Arthur A. Ballantine, of New York, former Under Secretary of the Treasury, then spoke concerning "The Lawyer of Tomorrow."

"Today optimism about any human institution," he declared, "seems to be rather out of date. It has been recently charged that the legal profession is technically incompetent—indeed, that the high percentage of technical incompetence could hardly be duplicated in any other professional field. The charge of technical incompetence is based largely on the belief that lawyers are too easily admitted to the Bar and are permitted to practice without adequate experience.

"It may be well to observe that keeping the requirements for admission to the Bar within reasonable bounds has been largely the result of application of the democratic tradition—not yet completely dead. A more serious answer is that our American Bar Association and local Bar Associations almost everywhere have made unflagging efforts to increase requirements for admission, and that those efforts have already borne much fruit. Those efforts will undoubtedly be pressed farther by the lawyer of tomorrow.

"It is asserted that the lawyer is defective in his standard of ethics. I believe that any ground for such statement is drawn from instances of individual departures from the Codes of Ethics carefully prescribed by our Bar Associations, standing out in contrast to the general observance of such standards. The broader charge is that lawyers, however technically competent and however personally honest, fail in the attainment of social justice, which is their proper responsibility. This is a serious charge. Yet it is to be observed that those who make it seldom attempt to define social justice.

"The lawyer's function is not to dictate the whole social process, but to deal with and defend the rights of the small or the great. Only if such defense is unethical can the general activity of the lawyer be criticized on this score. If the lawyer should be socialized or communized, as a distinguished foreign observer has suggested, so should the worker and the business man. The lawyer of the future must take a more open-minded attitude toward social change. Granted that we do not propose to abandon our American economic and social plan for that of Germany or Russia, it is still true that our people rightly propose to improve and perfect that plan. Today we scrutinize carefully the results of private industry all the way down the line, and demand that they be socially desirable.

"So long as we continue to have a system of private enterprise and individual rights, lawyers will be essential. Such a system cannot operate without the services of men skilled in the law. If that system should be liquidated, as it has been in certain countries abroad, lawyers will become mere clerks. The lawyer of tomorrow will be a better lawyer, better instructed and equipped, better oriented in his social attitude. He will make a distinguished contribution to the more satisfactory development of American life symbolized by this great exposition, with all its beauties and vivid interest."

Bar Associations and the Younger Lawyers

The second speaker of the opening session was ex-Judge William L. Ransom, former President of the Association, who was introduced as one of the original sponsors of the Junior Bar Conference. After bringing to the Conference the authorized greetings of the American Bar Association and President Hogan, his subject was an amplification of his opening sentence, that "The most conspicuous fact in the work of Bar Associations at the present time is the activity, the energy, and the militant public spirit, of the younger lawyers." He declared that "They have shown keen interest in building a representative and effective organization of the Bar of the whole country. As a first step, they organized their own National Conference of the Junior Bar, under the aegis and the encouragement of the American Bar Association.

Then they very definitely and enthusiastically aligned themselves on the side of those who were trying to make the American Bar Association realize and fulfill much more of the hopes, ideals and aspirations of the great rank and file of American lawyers. Today there are unfinished and equally important tasks, in improving the structure and effectiveness of State and local Bar organizations and the federation of Bar organizations within the States."

Judge Ransom urged the younger lawyers to work for a fully representative organization of the lawyers within the States and localities. "No one should feel content," he said, "with the fact that a representative National organization of lawyers has been achieved through the House of Delegates and is functioning with vigor and effectiveness thus far. The unfinished tasks of organization and upbuilding are within the States and localities. And if the younger men of the Bar of this country join with their elders in urging a truly representative organization of the Bar within their States and cities, a structure that is responsive to the needs and wishes of the average practicing lawyer, who shall stand in the way of bringing this to pass?"

The Selection and Removal of Judges

A topic uppermost in the minds of many of the younger lawyers was trenchantly presented by Former Attorney General William D. Mitchell, now of New York City, who spoke on "The Selection and Removal of Judges."

"We have lagged behind," he conceded, "in efforts to increase the economy and effectiveness with which controversies are dealt with in the Courts. There are three essentials:

"First, there must be adequate and efficient procedural systems to eliminate technicalities and to reach the truth and the merits.

"Second, there must be efficient business administration in the Courts to get the best results with the man power available.

"Third, there must be unimpeachable integrity, ability and impartiality in those who sit upon the bench.

"The greatest of these is the last. Great strides are now being made with the first two essentials. They present no difficult political problems. Politicians are not especially interested in them. No class interests are here involved. The selection and removal of judges is a problem of great difficulty. Into this field politics and political patronage become factors. Clashing class interests are forever insisting on packing the Courts with friendly judges.

"My judgment is that at present there is no practical chance of the adoption of any new plan which will work more satisfactorily than the present method of selecting Federal judges. The quality of Federal appointments has varied one way or the other from time to time. The Attorney General of the United States was recently quoted as saying that there has been too much of political consideration in the appointment of Federal judges. If he is referring particularly to the past years in this administration, we can agree with him. It is common knowledge, I think, among our profession that during the earlier years of the present administration altogether too many lower Federal judges were appointed at the dictation of local political leaders on the theory of recognition of political services. In recent months the quality of the appointments has distinctly improved. I do not know of any system which has a chance of adoption which would produce better results. If we cannot trust the President of the United States and the United States Senate to maintain proper standards on the Federal bench, public service has indeed reached a low level.

The Removal of Federal Judges

"A bill is now pending in the Congress that Federal district judges who are charged with misconduct may be tried and removed, not by impeachment, but by a Court consisting of three Circuit Judges designated by the Chief Justice. This proposal on its face seems reasonable, and as the judges would try the accused and can themselves be depended on to maintain the independence of the judiciary, it is suggested that the proposed system presents no real danger to the independence of judges. A serious question exists as to the constitutionality of this measure. It has been generally assumed since the adoption of the Constitution, that the sole constitutional method of removal is by impeachment. The Constitution provides for impeachment, but does not explicitly state that impeachment shall be the sole method of removal of judges, and so it is argued that it is competent for the Congress to provide by statute for some other system. My impression is that the overwhelming weight of opinion in the legal profession would be that the proposed measure is unconstitutional. If we concede that Congress may establish a special tribunal to try and remove district judges, it necessarily follows that Congress may adopt a similar system for Circuit Judges and Justices of the Supreme Court. Furthermore, if the Constitution permits a new statutory system, there is nothing in the Constitution which requires that the specially constituted Court shall consist of sitting judges, or that those judges shall be selected by the Chief Justice. Carried to its logical conclusion, the pending proposal requires us to concede that an Act of Congress may create a specially constituted Court to be nominated by the President and confirmed by the Senate, who may try and remove even a Justice of the Supreme Court. The proposed measure, therefore, has great implications, and I should hope that it will never be held that under the Constitution as it stands, Congress may set up specially constituted Courts to remove Federal judges.

"I have one suggestion to make along this line which may be worthy of consideration. Our Constitution now guarantees jury trials in common law actions. Nevertheless, it is generally agreed that a Court may appoint a referee in a jury case to hear evidence and make findings of fact on certain issues, and that those findings may be introduced at the jury trial as *prima facie* evidence of the facts, with the right to either party to call the same or other witnesses at the trial. If such a system is permitted under the Constitution in jury trials, there is a possibility that it would be sustained in impeachment cases, and that an Act of Congress providing that accusations against Federal judges should be tried by a Court and its findings of fact made admissible as *prima facie* evidence before the Senate in impeachment cases, would be valid.

"I am not expressing any opinion to that effect, but think the proposal deserves consideration, if anything is now to be done by statute. At any rate, with all respect to the proponent of the pending measure, in whose judgment I have the highest confidence, I think we should prefer to retain the present somewhat unwieldy system of impeachment rather than hazard the independence of the Federal judiciary by subjecting the judges to removal by any tribunal set up by an Act of Congress. If the system of trial and removal by a bench of judges is desirable, it should be estab-

lished by constitutional amendment, not by Act of Congress."

Judicial Selection in the States

General Mitchell then discussed the selection and removal of State Court judges. He said that "In any proposal for improvement, two fundamentals must be regarded: First, the original selection or nomination should be removed as far as possible from political considerations, and made by those who are in a position to know the real qualifications of the candidate. Second, once upon the bench, any judge who discharges his duties impartially and with competence and general satisfaction should be indefinitely retained. Continuity in office is vital to the quality of the bench.

"Among all the mass of proposals which have been made for reformation where the elective system now prevails, that recently adopted in California is most appealing. There the people were persuaded to adopt a system by which the Governor of the State makes appointments for all judicial vacancies subject to confirmation by a commission of qualifications, consisting of the Chief Justice of the Supreme Court, a Justice of the District Court of Appeals, and the Attorney General. The Justice thus appointed holds until the next biennial general election, when his name goes on the ballot with the question, 'Shall Judge —— be elected to the office for the term expiring January ——?' The sitting Judge thus subjected to the judgment of the voters has no candidate running against him. The election is in the nature of an approval or a judicial recall of the incumbent. If elected, he holds office for the regular term, after which his name comes up again in like manner. If his continuation is not approved at an election, a vacancy thus occurs, which the Governor fills in the same way. The only way to get on the bench is by the Governor's appointment. The electors decide whether the incumbent shall remain, and the exercise of their judgment is not confused by the presence of another candidate whose name may be better known by reason of some spectacular newspaper publicity. By this system the original selections are made by a man and approved by a commission elected by the people and responsible to them, and the electorate retain for all practical purposes their control over the judiciary. After a man has served on the bench for a time, the public is in a position to form a reasonable judgment on his qualifications.

"When it comes to the removal of State judges for misconduct, there is a wide field for improvement. The Constitution of most States provide for impeachment by the Legislature. A supplementary system would be useful."

The Supreme Court and the Wagner Act

The adjournment of the opening session was followed by a luncheon of the Conference, at the Court of Flame in the Gas Exhibit Building at the Fair. The morning speakers were guests of honor. The guest speaker was Chief Counsel Charles D. Fahy of the National Labor Relations Board, whose radio address dealt principally with the attitude of the Courts toward the works of the Board.

"If I were to be so bold," he said, "as to specify what in my opinion has been the greatest contribution of the Supreme Court in the great field of Labor relations, first embodied into law by Congress through the Labor Relations Act, and were I immediately to attempt to define the thinking of the Court with respect to its relations to this law, based on the eighteen decisions also rendered, I would name three general subjects for discussion:

"One, naturally the starting point was the question of constitutionality. The Court has generously given of its time and thought. Was the law a dead thing, barren of life, or did it possess the vitality of constitutionality. The decisions of April 12, 1937, posed this question, and it was found that the statute was alive.

"Two, hardly less important than these basic con-

Group at Regional Meeting of the Junior Bar Conference, Second Federal Circuit, at Town Hall in New York City, May 20, 1939.

stitutional decisions was the second problem presented to and authoritatively disposed of by the Court. Had Congress, in the methods of procedure, which it formulated for the administration and enforcement of the Act confined itself to means consistent with what we call the procedural due process or fair play, or was the method inconsistent with American standards, so that the lower Courts could, as some thought they had the right to do, cut across the statutory procedure and substitute themselves in the place Congress had put the Board? Were we to have administration by the Board and enforcement by the Circuit Courts as Congress said, or did something about the Constitution or about the standards of law or equity require that the District Courts administer the statute by injunction suits? On this question Circuit Courts were almost unanimous—one Circuit Court to the contrary. So this question reached the Supreme Court. The administrative process was again upheld as valid.

Three, the third question is the proper application of the statute in the field of labor relations itself. The record of the Board has been good. But this is not surprising. It is as it should be. The surprising thing is that the Circuit Courts of Appeals or some of them have been so often wrong. Our task is to administer justice, not to defeat it. Our task is to aid the Supreme Court to a correct solution, not to prevent the proper administration and enforcement of the law, not to evade or escape its temperate and sound obligations."

After a brief discussion of labor relations law, led by Thomas E. Kerwin, the members of the Conference went on an extended tour of the World's Fair, where many significant and forward-looking exhibits were noted in "The World of Tomorrow."

Saturday Round Tables on Lively Subjects

The sessions of the following day were held at the building of the Association of the Bar of the City of New York, which placed its comfortable and extensive facilities at the disposal of the younger lawyers. J. Ronald Regnier, State Chairman, Connecticut, presided at the morning session.

Professor Karl Llewellyn, of the Columbia Law School, spoke earnestly as to "The Economic Future of Today's Young Lawyers." The speaker gave a vivid picture of the prospects as he viewed them, and reproved the organized Bar for what he deemed to be its failure to deal more adequately with these urgent problems of need.

Theodore Kiendl, Chairman of the Grievance Committee of the Association of the Bar, gave a most informative and practical talk on "Standards of Judicial Conduct," which he illustrated from the experience of that Association. Round-table sessions were then held. Kenneth M. Spence of New York and others continued the aminated discussion of Mr. Kiendl's subject and Harrison Tweed of New York, noted for his leadership in legal aid work, asked the younger men to take an active interest in "The Lawyer's Responsibility to Poor Litigations."

Luncheon followed this worth-while program of discussion.

Round-table discussions were continued in the afternoon. George Z. Medalie, President of the New York County Lawyers' Association, which is the largest local Bar Association in America, presided over a discussion on the selection and removal of judges; George Nebolsine led a conference on administrative law, and Ralph Quillian of Atlanta, Ga., Chairman of the American Bar Association's Committee on American Citizenship, conducted a conference on the public relations work of the Junior Bar Conference. After these stimulating sessions, a brief business meeting took place.

Concluding Dinner of the Conference

In the evening the members of the Conference and their guests held a lively dinner at the Town Hall Club. H. Graham Morrison presided wittily as toastmaster. The speeches were informal and highly enjoyable. Speakers were President Frank J. Hogan, of the American Bar Association; Judge Irving Lehman, of the New York Court of Appeals; and Paul F. Hannah, of Washington, Vice-Chairman of the Junior Bar Conference. The first two speakers paid tribute to the integrity and diligence of the day-by-day work of the great number of trial and appellate judges throughout the land, and protested the efforts to seize on isolated instances of wrong-doing as a pretext for undermining public confidence in the judiciary. Vice-Chairman Hannah summed up the two-day sessions by saying to the members that—"For the last two days, you have been laboring with industry and intelligence over the complex problems of the administration of Justice and of the profession. Your public spiritedness, your willingness to contribute your time, energy, and training for the common good constitute an effective challenge to those who through ignorance or malice accuse our profession of indifference to the general welfare, greed and selfishness. Your performances furnish proof positive that the best traditions of our profession, which bring it time and time again to positions of leadership and respect, do not lack in the Second Circuit young lawyers eager and willing to carry on."

Meanwhile, in behalf of the Conference, former President William L. Ransom gave for the benefit of lawyers not present a radio address which told of the work of the Conference and commented on some of the matters discussed, with a cordial invitation to the younger lawyers to interest themselves actively in carrying forward the work of so dynamic an organization.

The large Committee of young lawyers who arranged and conducted the Conference was headed by H. Graham Morrison, of New York, with the active cooperation of Joseph D. Harrison, of New Jersey, Secretary of the Junior Bar Conference of the American Bar Association.

NEW SERVICE TO MEMBERS

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. Where available, please give Supreme Court's docket number, name of case, and, especially if docket number is not given, a word or two as to general subject matter and status of case. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

RECENT TENDENCIES IN LEGAL EDUCATION

Greater Acceptance of American Bar Association Minimum Standards Predicted—Period of Both Pre-Legal and Law Study not Likely to Be Extended beyond Six Years—Increasing Attention Will Be Paid to Prospective Law Student—High Measure of Student Accomplishment to be Required—Severe Bar Examinations Will Continue to Serve as an Informal Quota Device —Bar and Bar Examiners and Law School Faculties Likely to Develop Ways of Cooperating on Problems Concerning Qualifications for Admission — Opportunities for Keeping up with Legal Developments to Be Provided, etc.

By Charles H. Kinnane
Dean of University of San Francisco Law School

Number of Law Schools and Distribution

THERE are some 185 law schools in the United States. With regard to the number, perhaps one should do no more than refer to a comment made by Dean Green of Northwestern University a few years ago, to the effect that there are altogether too many law schools in the country. Certainly the point regarding the abundance of law schools seems self evident. It seems impossible to establish that any such number is needed in the public interest. In all likelihood the general situation regarding legal education would be greatly improved if many of them went out of existence, as a concentration of existing resources in fewer schools would, if only the tuition income were divided among fewer schools, result in a strengthening of the resources of many of the marginal schools which struggle along in spite of inadequate finances, and enable them to do more than the marginal work that many of them are barely able to do now. However, there has been no marked tendency for the number of law schools to decrease. In 1928 there were 173; in 1932, there were 182; in 1935 there were 195, and 190 in 1936; the pressure by the bar on many of the schools in many localities is definitely increasing however, and there is reason to believe that in the not too distant future, a substantial reduction in the number of law schools is likely to occur. This is prophecy however, and is subject to the usual hazards of error involved in that kind of activity. At any rate, no definite existing trend with regard to increase or decrease in number is apparent.

As to distribution, there are only a few states, such as Maine, New Hampshire, Vermont, Rhode Island, Delaware, New Mexico and Nevada that do not have a law school at all. In the other states the number ranges from one, to the nineteen in California. California is either blessed or afflicted with law schools. One may make his own guess by comparing Illinois with about seven million and a half of population, which gets along with eight law schools, with California which has about a million and a half less population, but which has nineteen,—or twenty if both branches of one school are counted as separate schools. The comparison is all the more marked when it is noticed that out of the eight law schools in Illinois, six or seventy-five per cent are approved by the American Bar Association, while in California, only six out of the nineteen, or thirty-one per cent—less than half the percentage in Illinois—are approved. California therefore represents the extreme in the matter of a large number in any particular jurisdiction, and that extreme in the matter of distribution is further colored by the large percentage of what might be described as sub-standard schools, meaning by sub-standard, a failure to meet the standards of the American Bar Association.

There has been no noticeable trend in the way of a change in this distribution. And none is likely except as the prediction ventured above may be borne out, that many of the weaker law schools are going to have increasing difficulty in surviving.

American Bar Association Standards

With the foregoing data in regard to number and distribution of law schools in mind, it might be well to pass to the matter of the American Bar Association standards, for it is with reference principally, although not exclusively, to those standards, that many of the trends hereinafter discussed, will be understood.

In 1921 the American Bar Association approved a set of standards regarding legal education in this country, which were designed to provide minimum safeguards against inadequate professional preparation. In brief the principal provisions in these standards were that two years of pre-legal study should be had before admission to law school; that three years of full time study, or a longer period which is substantially equivalent in the case of part time study, should be required of law students; that adequate law library facilities should be provided; and that (as construed by the Council on Legal Education and Admission to the Bar) there should be at least three full time teachers in every proper law school; that the school should not be operated as a commercial enterprise; that graduation from a law school should not confer the right to admission to the bar. While these standards were called in question several times in the following years, the stand of the American Bar Association was repeatedly reaffirmed in regard to them, and they are no longer under any serious attack. The trend toward acceptance of these standards, rather than toward contesting them, is one of

the more marked recent tendencies in the field of legal education in this country. This trend toward acceptance has occurred both within the American Bar Association itself, and outside it, as will be developed more in detail below, by law schools, legislatures, courts which by rule govern requirements for admission to the bar, and by bar examiners or bar associations which have control over admissions, or both.

A substantially similar set of standards has been approved for many years by the Association of American Law Schools, and members of that association, comprising 91, or about half of the law schools of the country must abide by such standards. The standards of the law school association are higher in some respects than those of the bar association, notably in regard to the number of full time teachers and in regard to the size of the library, and in many other particulars as well. As a consequence it happens that nearly every, if not every, school, admitted to the law school association also complies with the standards of the American Bar Association. There has been a marked voluntary tendency for the law schools to seek and obtain membership in the law school association in recent years, and so to adopt and put into effect even higher standards than those of the American Bar Association.

In 1923 the American Bar Association gave original approval to 39 law schools. There has been a steady increase in the number of schools qualifying for approval and at the present time, about fifteen years later, 101 out of the 185 schools, or 55% of the schools, containing about 62% of the students in this country, are approved by the American Bar Association. On the average about four new schools have been approved each year. This is shown by the following figures. In 1925, sixty-four schools were approved; seventy-one were approved by 1930, and eighty-two in 1935. The same general tendency has occurred in the matter of securing membership in the law school association. As a rule, as soon as a school approved by the American Bar Association can do so, it complies with the higher school association standards, and secures admission to the law school association. The membership in the school association is now approximately 91. It includes every state university law school, and every law school of more than merely local prominence in the country. It also includes the University of the Philippines.

To summarize the tendency toward voluntary acceptance by the schools of the American Bar Association standards, it might be said that starting with a definite minority of only 39 approved schools fifteen years ago, the situation has steadily changed until within the last two or three years the list of American Bar Association approved schools has grown to include the majority in the country, and now numbers 101 out of 185; and these approved schools contain a majority in the number of students of law in the country, or 62% of the 38,500 students in the law schools. This trend toward voluntary self improvement in order to meet and secure the approval of the American Bar Association is likely to continue for some time, perhaps at an accelerated rate, as the present minority appear to be abandoning their losing fight against the standards, and to be trying to improve themselves so that they can take their places with the majority.

The adoption of various of the American Bar Association standards as minimum standards for admission to the bar has received, and is receiving a no less remarkable approval by the various authorities which prescribe standards to be complied with by applicants for admission to the bar. This tendency has in all respects paralleled, and in some respects, has surpassed the adoption of the standards by the schools. As to the entire set of standards, a number of states now require the student to take his law study in a law school approved by the American Bar Association, and while there is some variation as to regulations in detail, it seems fair to say that the number has increased steadily until now it is substantially true in twenty-three jurisdictions that school study taken outside a school approved by the American Bar Association is as a rule unacceptable as qualifying a student to take the bar examination. This means then, that the student must have attended a law school approved by the American Bar Association, and so the student must have complied with the bar association standards as well as the school. This is particularly so with regard to the recommended periods of full time and part time law study.

As to the period of pre-legal study, the number of states that have come to require, substantially in all cases, although there are exceptions in details, at least two years of pre-legal study, has steadily increased until the number of such states has reached 41, or over three-fourths of the states. That the tendency has been a rapid one is shown by the fact that twenty of the states have put this requirement into effect within the last five years, or since January 1, 1935. There is substantial reason to believe that this same tendency will continue for it seems likely that at least Kentucky and Oklahoma will join the majority in this regard. It also seems likely that the remaining jurisdictions, namely, Florida, Georgia, Mississippi, Louisiana, Arkansas and South Carolina will have to do something to protect themselves from what is likely to be an inevitable influx to those states of those who are unable to qualify for the bar examinations in other states.

It should be noticed that to the extent that law study must be pursued in schools approved by the American Bar Association, such methods as law office, private and correspondence law study are not any longer acceptable. However, there is some lack of adjustment in these matters, for only about eight jurisdictions will not recognize these forms of study, although about 23 will not recognize school study, unless it is pursued at an approved law school. A peculiarity of this lack of adjustment is that there is doubtless some tendency to drive students who cannot attend an approved law school, out of law schools altogether, and into private or law office study as a means of qualifying for admission to the bar—a result that probably it is safe to say, was not intended. There is one check on this tendency however in that usually the inferior method of study must be pursued for a greater number of years than that in an approved law school.

One further point might be made before leaving the matter of the adoption of the American Bar Association standards. It is worth noticing

that there are still some eighty-four law schools, or 45% of the total number which do not meet the minimum standards which the profession has approved, and that 38% or approximately 14,000 out of the total of about 38,555 students, are attending schools which do not meet those minimum standards, Massachusetts has the dubious distinction of having the highest number of such students, or slightly over 3,000 of the fourteen thousand, and California comes next with over a thousand.

Associations Interested in Legal Education

Reference has already been made to the American Bar Association, which through its Council on Legal Education and Admissions to the Bar, has been actively interested since 1921 when the standards referred to were adopted, in the matter of improving legal education in this country. The Association of American Law Schools has also been referred to and nothing further will be said about it at this time, except to say that this association was formed in 1900 with 27 law schools, as an offshoot of the American Bar Association, as it was felt that the schools needed an organization of their own devoted to the problems of legal education, and perhaps more devoted to those problems than the then existing practising branch of the profession. The membership is voluntary and is a membership of law schools, as distinguished from a membership of law teachers. And while its standards have not received the attention in the way of formal recognition by legislatures, courts and other bar admission authorities that has been accorded to the standards of the American Bar Association, the law school association is nonetheless a potent, if not the most potent force in the matter of improving schools, and legal education, in the country. Teachers in member schools in many instances are influential in the American Bar Association, and in the various states where progress is being or has been made with regard to improved standards.

About a year and a half ago another law school association was formed, known as the National Association of Law Schools. This association likewise has for its purpose, various improvements in the standards regarding legal education. It has not yet however, become prominent in the legal educational situation in the country, but it has possibilities of usefulness, particularly among that group of law schools unable to secure the ratings given by the American Bar Association or the Association of American Law Schools, but desirous of doing sound and proper work within the limitations under which they must exist. The formation of this association may indicate a tendency on the part of unapproved schools to improve themselves, their methods and their work.

Types of Law Schools

The full time or day law school is so familiar that it needs no discussion here. The part time, or afternoon or evening type of law school is found principally in our large cities, and fills a demand for opportunities for part time study under conditions of supervision and direction that only law schools can provide. A type of school intermediate between these two, and often described as a "mixed" school is the one that conducts a full time day course, and a part time afternoon or evening course. That the part time and mixed schools meet a very definite demand is shown by the fact that in

HON. JAMES F. BYRNES
United States Senator from South Carolina—Speaker at Third Session of Assembly, Wednesday, July 12, 8:30 P. M.

1928 they had 67% of the law student enrollment, in 1931 they had 62% of it, and in 1937 they again had approximately 62% of the law school enrollment in the country, while the exclusively full time or day schools had not much more than half as many students, or 38%. It is worth while noticing however, that in recent years there has been a tendency on the part of the mixed type of school to become standardized and to secure approval by the bar, or law school, association or both, for the number of such schools to become approved has increased from 14 in 1935 to about 22 in 1938, and the number becoming approved has about quadrupled in the last ten years. In other words there seems to be a definite tendency on the part of the better established mixed schools to seek and obtain the same approvals that are held by the better full time or exclusively day schools; and these schools are therefore making a substantial contribution to the improved condition generally reflected by increases in the number of standardized law schools, in that approved mixed schools have about 40% of the student bodies in the approved schools, and about 25% or one fourth of all of the law students in the country.

Pre-legal Study

With regard to the content of pre-legal study, there has as yet been no committment by any important body as to what is and what is not acceptable pre-legal preparation, with the exception that courses obviously without intellectual content of substantial value, such as practical courses in mil-

itary, physical education, etc., are not acceptable. The requirement of the approving associations is, generally speaking, that the student must have completed at least half the work acceptable for a bachelor's degree granted on the basis of a four year period of study by the principal local colleges or universities. No compulsory distinction is made therefore between liberal arts, or engineering or agriculture, for example, as being acceptable pre-legal training. Many of the schools, however, are more discriminating, and have more stringent requirements. And probably it may be said that no very definite tendency toward specification in detail of the content of the pre-legal course of study can be perceived. Rather, as will be indicated below, the tendency seems to be directed at requiring the offering of a greater amount of pre-legal study, or the completing of pre-legal work with higher than minimum scholastic averages.

With regard to the amount of pre-legal work, a rapid and notable development has occurred, particularly within the last ten years and much of it within the last five, toward requiring, as a result of voluntary action in the schools themselves (although in one or two states a requirement of more than the usual two years of college has become obligatory as a result of action by the bar admission authorities) three and in some instances, four years of college work. Often the four year requirement is a degree requirement as well. This situation has been changing so rapidly in the last year or two that it is hard to keep up with it. A study made in 1938 disclosed, however, that out of the ninety or so then member schools of the Association of American Law Schools, the number requiring four years of college work for admission to law school (with minor exceptions in certain cases that need not be gone into here) had increased to ten; and thirty-three had come to require three years of college work instead of the usual two years required by the approving associations. In other words, within a very few years it happened that most of these forty-three, or nearly half of the schools in the law school association, had voluntarily increased their entrance requirements, most of them by a year, or fifty per cent, and some by two years, or a hundred per cent of the bar association and law school association requirements. There is every reason to believe that this tendency toward at least a three year pre-legal requirement is likely to continue.

Another recent and notable development has been the adoption voluntarily by the schools of higher requirements with regard to scholastic attainment during the pre-legal course of preparation than the usual "C" average required by the bar and law school associations. This situation is changing rapidly, and is hard to keep up with also, but a check made in 1938 of some but not all of the catalogues of the approved law schools in the country disclosed that several were highly selective in their admission practices and that others, while not admitting on a selective basis, did require those admitted to have averages ranging from a low C plus to a high C plus on their pre-legal work. Michigan notably has been requiring in some instances, if not all, an entrance average of B minus. And California will in general require a full B average on the last two of the required four years of college pre-legal work in 1939. Rather definite progress has been made in the stronger California schools, as four out of the six approved law schools in that state will require averages ranging from a low C plus to approximately a B average by 1940. One school in the South requires prospective students to have completed their pre-legal work in the upper half scholastically of their classes. An incomplete check discloses that at least fifteen of the law school association's member schools have selective or scholastic requirements of the kind mentioned. There is every reason to believe that as the pressure of stringent bar examinations becomes more felt by the schools and their student bodies, the schools in self protection in some instances and out of consideration for their less able prospective students in others, or through a combination of both reasons, will come to insist upon a higher measure of scholastic accomplishment than is necessary to enable a student merely to "get by" in college. It is becoming more and more apparent that the student of bare C average ability in college does not "have what it takes" to get through a high grade law school and a severe bar examination under present conditions.

Law Study

It may be too hasty, or too broad, a generalization to say that with regard to the course of law study, no significant new trend is apparent. However, it is believed that the generalization is substantially accurate. Projects of one kind or another have appeared and disappeared largely, if not entirely, in the last twenty years, and with them have gone equally various attempts at new kinds of legal education or new approaches to the study of law, or new methods of studying it.

One development should however be mentioned, not because on a quantitative basis it is yet significant, but because at any rate experimentation in this field is worth watching. That is the experiment being tried in at least three and perhaps four of the leading law schools in the country, for lengthening the almost universal three year full time course to four years—not by having students work for a master's degree, but by requiring that extra year of work for the bachelor's degree. Various studies have shown repeatedly that at least as far as work in law school is concerned the three year pre-legal students are better than the four year and degree pre-legals, and that the two year pre-legals are about as good as the three year men. In other words, there seems to be a point where the law of diminishing returns begins to operate in regard to the quantity of pre-legal work which is useful for success in law school —(as distinguished from success in after life, or as distinguished from the amount necessary to provide a liberal education or make one a cultured person, about which matters, no information is available so far as the writer is informed). Furthermore, there is reason to believe that the free and easy pace in many of the arts colleges permits the prospective student to waste his time there, and it is believed that many of the arts subjects useful in law study can be given more effectively in the law school, and with more point for law students than when given in the arts colleges. It is also felt that there are certain not strictly legal subjects that every law student should mas-

ter, and there is some feeling that those subjects can be best presented in law school and from a legal point of view. At any rate for one or the other of these three reasons, or because of a combination of some or all of them, a few schools, as indicated have put into effect a two year pre-legal requirement and have coupled with it a four year, instead of the usual three year, requirement of legal study. At least two other schools operate on a somewhat similar basis in that they will waive their normal four year pre-legal requirement and let a student in who has only three years of pre-legal work, if he will take a four year law course. At any rate, at least six leading schools are experimenting in one or the other of these two ways, with a four year full time law course leading only to the bachelor's or other first degree in law such as the J. D. degree. Six cases are perhaps too few to constitute a tendency, but the longer course has much to commend it, and it is being watched carefully by legal educators generally, particularly since it offers an opportunity, by reducing the number of pre-legal years, to crowd more into the years of law study, without lengthening the entire course of legal study, a course that is already a long one, ranging from five years as a minimum in an approved school, to seven years in those schools requiring a degree for admission.

School study, as compared to office, private and correspondence study, as noted above is the kind that must be taken to meet the requirements of the bar and law school associations. As already noted, however, it is not required as a condition for eligibility to take bar examinations in many jurisdictions, that the law study be prosecuted in a law school.

Curricular changes have not been particularly notable, taking the country as a whole. Administrative law is finding a place on more and more curricula in keeping with the increased importance of the matter of government through administrative officers, boards and commissions. Taxation is also a subject that is being fitted into the present day curriculum with increasing frequency. Labor Law and Trade Regulation are also courses that are likely to find places increasingly in the curricula of the schools. Some change has occurred in the direction of compressing the so-called standard or fundamental courses into the first two years, so as to leave the last year available for a wider choice among elective subjects, some of an advanced character, in fields in which the student may wish to specialize. This situation has, however, hardly become a general one, or even a generally important one, as yet.

Bar Examinations

It should not be too strange that a discussion of trends in legal education should contain some reference to the various aspects of the matter of bar examinations, for directly and indirectly, such examinations have a bearing on the educational process and upon the educational standards prevailing in the schools.

As to the diploma privilege, whereby students are admitted to the bar solely on the basis of graduation, from certain schools, without having to pass a bar examination, this privilege was disapproved of in the 1921 standards of the American Bar Association, and in some instances the privilege has been surrendered by, or taken away from certain schools. However it appears that there still were some twelve jurisdictions, as late as 1937, where admission to the bar on diploma could be obtained. Where such a mode of admission is available, it might be suggested as bearing on the matter of legal education, that the stimulus to schools and to students of requiring students pass a bar examination after graduation is lacking. It is not meant to suggest that this stimulus is necessary in every case, but it is the considered opinion of the organized bar that where it exists, there may be an unwholesome tendency on the part of the schools to become complacent in the matters of standards and general effectiveness.

There has been a marked tendency toward cooperation between the law schools and the state bar associations, or local bar examiners, in recent years, so that now rather definite organizations exist in approximately twenty of the states, which provide an opportunity for the teachers and the examiners to get together to thrash out these problems of legal education common to both bodies as to what shall be taught in law school, and what shall be examined on by the examiners, what the student pace or measure of student accomplishment should or shall be, and how much correlation there should or must be between the judgment of the law faculties and of the bar examiners regarding the sufficiency of the preparation of law students for admission to the profession. California has been notable in providing one of the best opportunities for this kind of working together at some of the important problems of legal education, and its Committee on Cooperation Between the Law Schools and the State Bar—and the bar examiners—has furnished a model for the recent development of organizations with similar aims and objects in other states. There is every reason to expect that the experience in this kind of cooperation will lead to providing similar cooperative committees in other jurisdictions.

The tendency in recent years has been for the bar examinations to become or to remain severe. Percentages passing, taking the country as a whole for 1935, 1936, 1937 and 1938 were respectively 48%, 46%, 48% and 48%. First timers in 1937 were only 48% successful, so that the percentage of successful first timers throughout the country was the same that year as the percentage of all who passed the examinations. First timers were 58% successful in 1938. There is reason to believe that in some localities the low percentages passing have caused the schools to try to improve themselves, so as to have a better student record on the local and other bar examinations. This situation is likely to continue with a tendency towards some improvement in the standards of student accomplishment in the schools, as there is no sign that the bar examiners are likely to relent in their practices of failing approximately half those who apply for admission to the bar. A serious question arises as to whether as the schools improve, the bar examiners will become even more exacting, in an effort to prevent too many admissions. It is probably a safe guess that as the quality of the applicants rises, the requirements for admission will also rise so that, at least for some years, it will just be harder and harder to get licensed to practice, instead of that the exam-

iners will pass the increasing number of better prepared students who are able to meet the old standards.

Post-graduate Training

Aside from the courses of post-graduate study leading to advanced degrees, to which no reference will be made here, there are two other matters of post graduate law training that should be mentioned, although only briefly.

The matter of how to provide some adequate training in practice continues to harass those who feel that one should not be licensed to practice until he has had some adequate preparation for the problems of practice other than the kind of largely theoretical training which is almost exclusively available in most of the law schools. The old difference between the view that the place to learn practice is in practice, and the view that the law schools should somehow be able to teach practice, has been complicated by efforts to carry out and develop a third view that perhaps the bar itself can make some kind of provision for teaching the beginners something about practice, either by conducting clinics in various localities, providing sponsors for the newly licensed, or by withholding a full license to practice until the beginner has practiced for some period of time under supervision. None of these ideas has as yet however become dominant, and the only tendency in regard to the matter of training law students in practice, is the tendency that there will continue to be for some time, the same difference of opinion, and likely very little in the way of definite accomplishment in solving the problem of apprenticeship or clinical experience, at least for some time to come.

HON. W. F. LILLESTON
Speaker at Annual Dinner, Thursday, July 13

A notable development has occurred in the matter of providing courses and institutes for experienced practising lawyers. Such institutes have been held in the last two years with increasing frequency in many parts of the country. They are sponsored by schools, alumni groups or bar associations, which invite men who are known to be expert in particular fields to discuss the problems in those fields in detail; or the institute may take another form and consist of a group of lectures on many subjects of the law, of particular current interest or importance. This kind of "adult" education has proved quite popular, and is being given considerable support and assistance by the efficient adviser of the American Bar Association's Council on Legal Education and Admissions to the Bar. The numerous institutes on the new federal rules of civil procedure for the district courts, illustrate the popularity and significance of this tendency to provide and to use opportunities for post-admission education.

Decline in School Enrollments

The foregoing summary of tendencies in legal education, while not inclusive of all matters that might be of interest in this connection, probably supplies enough information to support the inference, if it were necessary to depend on inference, that we are in the course of overhauling rather rapidly some aspects of our system of legal education, at least to the extent that it seems safe to say that the days of laissez faire are about over, both for law schools and for law students.

As a result of many forces, it seems clear that admission to law school has become and is likely to continue to be more difficult. It also seems likely that pressure of various sorts will continue to be put on law students, some as a result of pressure by the organized bar, and some as the result of voluntary efforts on the part of the schools to improve themselves and their student products, to force the students to extend themselves in law school, or to get out, so that only the best will go on to the bar examinations. And the severity of the bar examinations is such in itself as to tend to discourage many who are neither able nor serious in their purpose, from undertaking the rigorous course of study and of selection that lies ahead. It would not be surprising therefore if law school enrollment showed a tendency to decline.

The fact is that for several years there has been a tendency, taking the country as a whole, for enrollments to decline, and the rate has been at about two per cent a year, on the average during the last few years. It appears that the decline has been from nearly 42,000 students in 1935 to about 38,500 students in 1938, or a drop of about 3,500 students. It might be considered somewhat surprising that the general drop has not been greater. This might be attributed to the fact that more able students foresee an opportunity for themselves in legal practice, that from some points of view is probably more favorable than in past years when it appeared that those seeking admission to practice might be admitted almost without restriction as to number. The small amount of the drop may also be attributable in part to a feeling that notwithstanding the general depression we have been in, it is still worth while to seek a legal education, and perhaps more profitable in the long run to spend the post-

college years at this activity than to spend them hunting for jobs that are likely to remain hard to get. There may also be some disposition on the part of prospective students to realize that, as some statistics about the profession establish, the lawyers have been able to go through the depression in better shape generally speaking, than other professional men, and in better shape than business men. However, there is responsible opinion that a further decline in the number of law students is to be expected. And with all the pressure put on the students by the bar, the bar examiners and the schools, it would be strange if such decline did not occur.

Conclusion

It is difficult to review tendencies without succumbing to a temptation to make a forecast of what lies ahead, even tho' prophecy is always hazardous. Without going into the matters forecasted in detail, it seems reasonably safe to predict that the following are likely to occur:

1. There will be a greater acceptance of the minimum standards of the American Bar Association both by the schools and by the bar admission authorities in the various states.

4. The requirements regarding pre-legal study are likely both to be increased in some schools, and decreased in others which wish to lengthen the law school course, but it hardly seems likely that in general, the period of both pre-legal and law study will be extended even in the better schools, at least for some time, beyond six years.

5. Increasing attention will probably be paid to the ability of the prospective law student and this matter will probably be scrutinized as closely as the number of credits he offers for admission to law school.

6. The course of law study is not very likely to exceed three years of full time work, generally speaking, but it seems certain that a high measure of student accomplishment will be required.

7. The bar examinations are likely because of their severity to continue to serve as an informal means of limiting, as well as of testing, those who seek admission to practice, and so as a sort of informal quota device.

8. The bar and bar examiners on the one hand and the faculties on the other are likely to develop ways of getting together and of working together on the problems of common interest to all in the profession, namely the education and qualifications of those seeking admission to it.

9. Opportunities for keeping up to date with legal developments are likely to be available and availed of with increasing frequency, through the provision of institutes and courses for mature and experienced lawyers.

10. The way of the law student is going to be hard, and some substantial drop in the number of them is likely to occur, barring a lifting of the depression, or a discovery that the various tendencies to limit admissions to the bar have in fact raised the economic condition of lawyers generally to a point where new competition is invited.

CORRECTION

In the head to Mr. Allen L. Chickering's interesting article on "Drake's Plate of Brass" in the June issue of the JOURNAL, it was stated that Mr. Chickering is a member of the Los Angeles bar. This was an error. Mr. Chickering is and has been for a great many years a member of the bar of San Francisco.

Fourth Circuit Judicial Conference Meets at Asheville

BY WILL SHAFROTH

Adviser of the Section of Legal Education of the American Bar Association

THE Ninth Judicial Conference of the Fourth Judicial Circuit of the United States, held at Asheville June 8, 9, and 10, 1939, brought together members of the federal bench and leaders of the bar from five states and the District of Columbia, and bore fruit in a number of constructive suggestions for the improvement of the administration of justice. The work of this Conference, inaugurated eight years ago by United States Senior Circuit Judge John J. Parker, is particularly important at the present time, in view of the fact that the Ashurst Bill (which has passed the Senate and has been favorably reported to the House), creating an administrative office for the United States courts, also provides for an annual judicial conference in each circuit, similar to the one just held at Asheville.

The object of the Conference is discussion by the bench and bar of proposed measures which will benefit the work of the courts. During the time when the various drafts of the new Rules of Federal Procedure were under consideration, sessions of the Conference were devoted primarily to a discussion of the rules, which familiarized the bar of the circuit with these rules at an early date and produced some helpful ideas concerning them. The Conference is limited to designated delegates, as a result of which it is regarded as a distinct honor by the members of the bar to be included among those invited to be present.

The first session on Thursday morning consisted of a conference of all the United States District and Circuit Judges to discuss the conditions of the dockets in the various Districts and any suggestions or questions which any of the individual judges desired to bring up. The day was given over largely to informal discussion, the only formal address being that of Mr. Alexander Holtzoff, Special Assistant to the Attorney General of the United States, who spoke on the purposes and constitutionality of the federal Juvenile Delinquency Act.

The Friday morning session was held in the United States District Courtroom, with Judge John J. Parker presiding. It was opened with a roll call of the delegates to the Conference, who included, in addition to all of the federal judges, United States attorneys, and state attorneys general in the Circuit and in the District of Columbia, the presidents of the state bar associations and five delegates appointed by each, the deans of grade A law schools in the Circuit, three lawyers named by each Circuit Judge, and members of the committees on rules and procedure, to which each District Judge appoints two, who serve for a period of three years. The total attendance at Asheville amounted to about a hundred, with all federal judges in the Circuit present except two.

The morning session on Friday was given over to addresses by Hon. Justin Miller, Associate Justice of the United States Court of Appeals for the District of Columbia, and by Col. O. R. McGuire, Chairman of the American Bar Association's Committee on Administrative Law. Justice Miller spoke on the subject of the desirability of giving the Supreme Court power to promulgate rules of procedure in criminal cases.

He pointed out that this was a logical development following the promulgation of the new rules of civil procedure, that such rules were already in effect with reference to procedure after verdict, and that the adoption of the bill on this subject now before Congress would be another important step forward toward improved criminal justice. Col. McGuire discussed essential safeguards which must be applied to administrative tribunals, and pointed out that the bill which is being supported by the American Bar Association fully recognizes the necessity which exists for administrative adjudication, and simply attempts to apply the necessary safeguards to the present situation.

The afternoon session was opened by Hon. James V. Bennett, Director of the Federal Prison Bureau, who spoke on the subject of disparity of sentences. His remarks brought forth a lively discussion from the judges present, including Judge Henry H. Watkins of South Carolina, Judge Edwin Y. Webb of North Carolina, Judge John Paul of Virginia, Judge William E. Baker of West Virginia, and Judge William C. Coleman of Baltimore. Mr. Bennett stressed the effects on prison morale of widely differing sentences for the same crime, while the judges pointed out that the different circumstances under which the crime was committed, as well as the previous history and background of the defendant, necessarily made vital differences. The exchange of views on the subject was valuable and interesting.

The next item on the agenda was a discussion of the new rules by the following members of the bar: Walter Brown, Huntington, W. Va.; Charles Markell, Sr., Baltimore, Md.; Professor J. Douglass Poteat, Duke University Law School; and Lewis C. Williams, Richmond, Va., President of the Virginia Bar Association. Mr. Brown discussed the interpretation which the courts had thus far made of the rules; Mr. Markell devoted his attention to District Court rules; Professor Poteat spoke mainly on Rule 14 with reference to third-party practice; while Mr. Williams spoke on the efficiency of the procedure under the new rules and the general approval which they have received from the bar.

Friday evening the annual dinner was held at the Grove Park Inn. The banquet was presided over by Judge Parker, the speakers being Governor Homer A. Holt of West Virginia, State Senator Holman Willis of Roanoke, Va., Judge John Weymouth of Hampton, Va., and the most recently appointed federal judge in the Circuit, Hon. Armistead M. Dobie, United States District Judge for the Western District of Virginia. The affair was a most enjoyable one, with a combination, in excellent proportions, of serious discussion and wit and humor.

The last session of the Conference was held on Saturday morning, and was devoted to reports of committees on District Court rules and a discussion of pre-trial procedure. The following reports were made for committees on District Court rules: Charles McHenry Howard, Baltimore, Md., on Uniformity in the Circuit; Charles Markell, Sr., Baltimore, Md., for the State of Maryland; Thomas B. Gay, Richmond, Va., for the State of Virginia; Arthur S. Dayton, Charleston, W. Va., for the State of West Virginia; Julius C. Smith, Greensboro, N. C., for the State of North Carolina; Henry E. Davis, Florence, S. C., for the State of South Carolina.

Following these reports, Hon. Robert M. Pollard, United States District Judge for the Eastern District of Virginia, spoke of his own experiences in initiating pre-trial procedure in his court. He was followed by Justice Bolitha J. Laws, of the United States District Court for the District of Columbia, who reported on an extensive investigation of the subject which he had made at the direction of his court. Discussion of the subject was then led by Douglas McKay of Columbia, South Carolina, G. Ridgely Sappington of Baltimore, Maryland, William A. Stuart of Abingdon, Virginia, and Frank E. Winslow of Rocky Mount, North Carolina. These papers were well prepared and valuable. Especial mention should be made of that of William A. Stuart, who discussed conditions in the Western District of Virginia, and pointed out very convincingly the values which pre-trial procedure may have in a rural district, where terms of court are infrequent and distances to be travelled are often considerable. Judge W. Calvin Chesnut of the United States District Court at Baltimore added some interesting observations as to the usefulness of pre-trial procedure in settling issues and shortening the time required for trial.

The Conference adjourned at noon.

Special arrangements were made for the entertainment of the wives and friends of the delegates, including an automobile trip and a visit to the extensive Biltmore Estate. The facilities of the Grove Park Inn, with its beautiful location, its famous golf course, and its excellent accommodations, proved ideal for such a Conference, which is always held at that place. A similar meeting was held in the Third Circuit last year, and the District of Columbia has also held such a meeting. The success which has attended the Fourth Circuit Conferences has been due, in no small part, to Judge Parker's organizing ability and to the interest which he has taken as a result of his belief in the value of bringing together the members of the federal judiciary and leaders of the bar in the Circuit. Credit for the efficiency with which the meeting was planned and run off should also be given to Mr. Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, who was secretary of the Conference.

Since similar conferences will, in all probability, be organized in other Circuits, the rule which the Court has promulgated in reference to it, which is Rule 32 of the Revised Rules of the United States Circuit Court of Appeals for the Fourth Circuit, may be of interest. It reads as follows:

"1. There shall be held each year at the Asheville term of this court a conference of all of the Circuit and District Judges of the Circuit for considering the state of business in the various Districts, for devising means for relieving congestion of dockets where this may be necessary, for improving procedure in the courts and for exchanging ideas with respect to the administration of justice. It shall be the duty of every Judge of the Circuit to attend such conference.

"2. The first day of the conference shall be for the judges alone and shall be devoted to a discussion of matters affecting the state of the dockets and the administration of justice in their respective Districts. Members of the bar to be chosen as set forth in the succeeding paragraph shall be members of the conference and shall participate in its discussions and deliberations on the second and third days.

"3. Members of the conference from the bar shall be composed of the following:

"(a) The presidents of the state bar associations of the states of the Circuit, and five delegates from each of such state bar associations to be appointed by the president thereof.

"(b) All United States Attorneys of the Circuit.

"(c) The Attorneys General of the several states of the Circuit.

"(d) One representative of each grade A law school within the Circuit.

"(e) Lawyers of the Circuit appointed as members of the conference by the Circuit Judges. Each Circuit Judge shall annually appoint three lawyers as members of the conference for that year.

"(f) Members of the committees on rules and procedure appointed by District Judges. Each District Judge shall appoint two members of a committee on rules and procedure to serve within his District for a period of 3 years, and all such committee members shall during their periods of service be members of the conference.

"If any state bar association president or District Judge shall fail, upon request, to appoint the delegates or members of committees which he is herein designated to appoint, the Senior Circuit Judge of the Circuit shall make such appointments.

"4. The clerk of this court shall be secretary of the conference and shall make and preserve an accurate record of its proceedings."

The officials present at the Conference included the following:

Federal Judges: Hon. John J. Parker, Senior Circuit Judge, Charlotte, N. C.; Hon. Elliott Northcott, U. S. Circuit Judge, Huntington, W. Va.; Hon. Morris A. Soper, U. S. Circuit Judge, Baltimore, Md.; Hon. Henry H. Watkins, U. S. District Judge, Anderson, S. C.; Hon. Edwin Y. Webb, U. S. District Judge, Shelby, N. C.; Hon. William E. Baker, U. S. District Judge, Elkins, W. Va.; Hon. George W. McClintic, U. S. District Judge, Charleston, W. Va.; Hon. William C. Coleman, U. S. District Judge, Baltimore, Md.; Hon. Luther B. Way, U. S. District Judge, Norfolk, Va.; Hon. W. Calvin Chesnut, U. S. District Judge, Baltimore, Md.; Hon. John Paul, U. S. District Judge, Harrisonburg, Va.; Hon. Frank K. Myers, U. S. District Judge, Charleston, S. C.; Hon. Robert N. Pollard, U. S. District Judge, Richmond, Va.; Hon. Charles C. Wyche, U. S. District Judge, Spartanburg, S. C.; Hon. Harry E. Watkins, U. S. District Judge, Fairmont, W. Va.; Hon. Armistead M. Dobie, U. S. District Judge, Charlottesville, Va.; Hon. Alva M. Lumpkin, U. S. District Judge, Columbia, S. C.; Hon. Justin Miller, Justice U. S. Court of Appeals, Washington, D. C., and Hon. Bolitha J. Laws, Justice U. S. District Court, Washington, D. C.; United States Attorneys J. Bernard Flynn, Baltimore, Md., Joseph V. Gibson, Kingwood, W. Va., Carlisle Higgins, Greensboro, N. C., David A. Pine, Washington, D. C., and Claud N. Sapp, Charleston, S. C.; Attorneys General Clarence W. Meadows of W. Va., Abram P. Staples of Virginia, and William C. Walsh of Maryland; State Bar Presidents Fred M. Hutchins of the North Carolina State Bar, C. W. Muldrow of the South Carolina Bar Association, W. G. Stathers of the West Virginia Bar Association, Lewis C. Williams of the Virginia Bar Association, and Sefton Darr, President of the District of Columbia Bar Association; and James V. Bennett, Director of the Federal Prison Bureau, Alexander Holtzoff, Special Assistant to the Attorney General of the United States, Homer Cummings, former Attorney General of the United States, Thomas B. Gay, Chairman of the House of Delegates of the American Bar Association, and Hon. Homer A. Holt, Governor of West Virginia.

Charles H. Moorman: A Tribute

BY WALTER P. ARMSTRONG
Member of the Memphis, Tenn., Bar

IN WHAT I shall have to say of Judge Moorman, I shall not attempt to deal in personalia. It was not my privilege to know him intimately enough for me to venture to speak of that phase of his life.

I shall confine myself to suggesting how as a judge of this court he appeared to the Tennessee lawyers. This may perhaps supply at least a certain point of view for the eventual appraisal of his judicial service, for, after all, the impress that a public man leaves upon his generation is one of the bases for the definitive evaluation of his career.

Kentucky and Tennessee are unusual states. They stretch from the mountains to the Mississippi. Each has three natural subdivisions—valley, plateau and highland. The result is certain diversities, economic and otherwise, in each state among the different grand divisions. Since each possesses these identical characteristics, no two states are more like one another. Indeed, in some respects the same sections of the two states are more homogeneous than the different sections of the same state. We believe, therefore, that we know the stock from which Judge Moorman came and understand the people among whom he lived and the background that was his. In reviewing his career we may have a bit more detachment but certainly not less admiration than his friends and neighbors in Kentucky.

We in Tennessee are convinced that Judge Moorman fully measured up to the standards and ideals of this court. That we consider superlative praise—sufficient for any judge.

We have cast about for the explanation of his expert competency and success as an appellate judge, and certain facets of his judicial character seem to us to shine with singular luster.

The Sixth Circuit in its characteristics is almost unique. It is a vertical section of the nation, cut North and South mid-continent. It extends from the Great Lakes to within four hundred miles of the Gulf of Mexico. Its litigation poses for judicial solution intricate and perplexing problems of mining, industry, commerce, shipping and all kinds of agriculture. To cope with these questions a judge requires, in addition to his other equipment, great breadth of vision and great versatility of mind. Judge Moorman naturally possessed these qualities. No doubt they had been further developed by his experience at the bar and on the bench in Kentucky, where on a smaller scale similar diverse conditions had to be dealt with.

We think he had another noteworthy asset as an appellate judge—his experience as a trial attorney. When he first put on the judicial robes the dust of the forum still clung to his garments. The result was that a record to him was not merely cold print. It was a drama of the kind in which he had often played a

*On June 6 there was held in the courtroom of the Circuit Court of Appeals for the Sixth Circuit at Cincinnati a memorial service for Judge C. H. Moorman, who died on January 26, 1938. At the service there was one speaker from each state in the circuit as follows: Judge Arthur C. Denison of Cleveland, from Ohio; Walter P. Armstrong, of Memphis, from Tennessee; James Turner, of Detroit, from Michigan; and George R. Hunt, of Lexington, from Kentucky.

At the conclusion of the addresses there was a response by Judge Hicks, Presiding Judge, and by Judge Allen, and then a portrait of Judge Moorman was presented to the court by his family, to be hung in the courtroom. It was accepted by Judge Simonds of the Court.

leading part and many of which he had watched from behind the scenes. The "business" was old and well understood. Only the lines were new. He could visualize each scene and this gave him a canny faculty for getting at truth and justice.

It sometimes occurs to me that an ideal appellate court would be one on which the viewpoints of the practicing lawyer, the trial judge and the law school man are all represented. Each one has much to contribute. But an appeal is after all, the review of a trial. No one understands a trial better than he who has participated in many both as a lawyer and judge. Judge Moorman had had both experiences and had thoroughly learned their lesson. When one reflects upon how his practice as a lawyer implemented him for his duties upon the bench one is persuaded that one of the merits of the English judicial system is the fact that the leading barristers confidently look forward to judgeships as the culmination of their careers at the Bar.

Judge Moorman received no formal legal education. He acquired his knowledge of the law the hard way. Here, too, he squeezed the last drop of advantage from his experience. In the case of a man of less strength of fiber or less quickness of perception this might have resulted in mediocrity. Not so with Judge Moorman. It taught him self-reliance and inspired his vigorous mind to explore for itself all avenues of the law instead of merely attempting to follow dim and uncertain trails others had partly blazed.

Too often the student is but a dim reflection of his teacher. Judge Moorman was teacher and student in one. He had the energy of mind and thirst for learning that should but does not always go with both. This self-education engendered a certain awareness of the realities of life not always found in the school man. This did not mean that even in his judicial duties he was averse to the "Graces." The care with which he wrote and rewrote—often in long hand—his opinions sufficiently refutes any such thought.

He had, however, a definite conception of the purpose of an opinion. One of the judges of a great state court of last resort once commented to me upon the opinions of one of his associates who had a deserved reputation for the brilliancy of his style. He praised his learning, the purity of his diction and the beauty of his imagery. He added, however, that the court had a great deal of difficulty in determining with precision just what his famous associate had meant to decide. He would not have been thus troubled by Judge Moorman's opinions. Judge Moorman did not conceive of an opinion as an opportunity for displaying his learning or coining sparkling epigrams. To him its function was correctly to decide and clearly to phrase the decision of the issues presented. It must be easily understandable not only by those immediately concerned but by the lawyers and judges who in the future must need apply it. His desiderata were logic, precision and clarity.

We thought we detected in Judge Moorman another trait which made for his effectiveness as a judge. This was a certain impatience with wrong and injustice. He did not think of Justice as in the trenches resisting the onslaught of Wrong. He thought of her as ever advancing toward her ultimate objective and summarily brushing aside all who would stay her progress.

Not so many years ago there lived in Middle Tennessee a famous educator of boys. We called him "Sawney" Webb. He was a stern disciplinarian with something of the crusading spirit. One of his favorite expressions was: "The way of the transgressor is hard and I try to make it hard." Judge Moorman would have undertood what he meant.

Thus we saw him: a man of broad vision and great acuteness of perception, thoroughly versed in all phases of litigation, well grounded in the law, a learned judge whose erudition resulted from his own efforts which never ceased, physically and mentally self reliant and fearless, with a love of justice and a contempt for wrong—above all with that judicial integrity which no man ever questioned. Of him were the words of Thomas Fuller true, that when he put on his robes he put off his relations to any, and became, like Melchisedec, without pedigree.

May I pause here to say that Judge Moorman had an utter abhorrence, which he did not hestitate to express, for the conduct of any judge which tended to conflict with the exercise of the judicial function or to derogate from the dignity of the judicial office. That in this he typified thousands of judges is a fact that the public should not be allowed to forget when at rare intervals glaring headlines tell them of isolated exceptions.

Less than a month ago I heard the Attorney General of the United States, with a tone of pride in his voice, say to your senior judge, "The Sixth is a great court." The Attorney General was right. The Sixth is and has always been a great court. It has not only had its Taft and its Lurton. It has had many other distinguished judges who have ably carried on its work, and worthily upheld its traditions. As one of these Judge Moorman will be long remembered, not only in his native Kentucky and in her sister state, Tennessee, not only within the Circuit, but throughout the nation.

STEPHEN F. CHADWICK
National Commander of the American Legion—
Speaker at Annual Dinner, Thursday, July 13

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

POWER: A NEW SOCIAL ANALYSIS. By Bertrand Russell. 1938. New York: W. W. Norton & Co. Pp. 315.—In their blurb on the dust-jacket Mr. Russell's publishers proclaim:

"Bertrand Russell approaches this question from the point of view that power is the fundamental concept in social science, just as energy is the fundamental concept in physics. Power, like energy, he maintains, must be regarded as continually passing from any one of its forms into any other. Therefore, in POWER he seeks to find the laws of such transformations."

The suggestion seems to be that by the time Mr. Russell gets through manipulating his "new social analysis" the Social Sciences will have been reduced to a department of the Physical and Mathematical Sciences. It may be said at once that this promise is fulfilled very indifferently. Indeed, I doubt if Mr. Russell, by writing *Power,* has advanced the cause of social prediction one whit.

The book is, of course, Mr. Russell's reaction to the present vogue of "Power Politics." Not unnaturally it tends to exaggerate its central theme. From assailing the Marxian dogma that "economic self-interest" is "the fundamental motive in the social sciences" (p. 12), Mr. Russell proceeds to lay down the law in the following words: "Love of power is the chief motive producing the changes which social science has to study" (p. 15). Yet thirty pages further along one comes upon a very different hypothesis, namely that "men of science are the fundamental cause of the features which distinguish our time from former ages" (p. 45).

The book's contribution lies in its emphasis on the by no means novel idea that power, in the sense of the ability of some people to determine the conduct of other people, is a social and not exclusively political phenomenon; but that there is a tendency nevertheless for all power to gravitate toward the political vortex —the State, in short. Mr. Russell's own attitude toward this tendency is divided. As a socialist, he believes that "wherever modern technique exists, economic and political power must be unified" (p. 285); as a liberal, he does not wish this mergence to result in governmental control of opinion. How are these two desiderata to be harmonized? Mr. Russell thinks they can be in a democracy, if it will but cultivate a tolerant spirit (p. 294), in which connection two things are especially essential: the prevention of war (p. 296), and a system of education in which the pupils will "acquire immunity to eloquence." This latter, he asserts, "is of the utmost importance to the citizens of a democracy" (p. 300).

In short, there is no way of checking power—at least in the kind of State Mr. Russell wants—unless there is an active disposition among the people at large to do so, and the existence of this will depend on the kind of education which these same people choose to maintain.

The book is much too long. It has many striking observations, but also many that are either trite or trivial. The wealth of historical allusion is immense—and somewhat cloying. Explanation of the entries of the Index would keep Mr. Clifton Fadiman and his team of experts busy some months.

Princeton EDWARD S. CORWIN

The Shorter Oxford English Dictionary on Historical Principles, prepared by William Little . . . H. W. Fowler . . . J. Coulson. Revised and edited by C. T. Onions. Vols. I and II. 1936. Oxford: At the Clarendon Press. Pp. 2475.—This work is an abbreviated form of the great *Oxford English Dictionary,* which, after seventy years of collecting and editing, was brought to completion in 1928. The *OED* is the greatest historical dictionary in any language and is of course the only one of its kind in English.

In 1902 an abridged edition of the *OED* was initiated. The abridgers were confronted with the problem of reducing the 15,500 large quarto pages of the original work to approximately 2,500 pages slightly less in size than those of the original work. As an indication of the successful manner in which this abridged edition, which appeared in 1933, was made there now appears in the work under consideration a revised edition in which, we are told, "some three thousand changes have been made of one kind or another."

The object from the outset in the abridged edition has been to retain so far as possible the excellencies of the vastly more voluminous and expensive *OED.* An examination of the *Shorter Oxford* shows that it has been made with painstaking care and discrimination.

To begin with, it gives an excellent idea of the history of the words and meanings which it includes. For example, the time was when the word *Idiot* in English meant nothing more severe than "An ignorant, uneducated man." Other dictionaries duly record this meaning of the word but without giving any very precise indication of the time when such a meaning prevailed. The *Shorter Oxford* points out that it was not until the Middle English period that *Idiot* came into English, from the Greek, and that the meaning just given was the first it had in English, a meaning quite in line with the derivation of the word. This meaning, according to the *Shorter Oxford,* persisted as late as 1722, after which time it ceased to be current and is now obsolete.

This historical aspect of the *Shorter Oxford* is one of its most characteristic features, but there are others as well. Along with the historical arrangement and indication of the senses of the words it includes there are also given thousands of illustrative passages in which the words are shown in use with the meanings pointed out. For example, as illustrating the use of this word *Idiot* in its first English meaning the follow-

ing passage from Caxton is given: "The bisshop repreuyd hym sore as unconnyng and an ydeote."

These passages are of course brought over in appropriate form from the million and a half such excerpts found in the larger *OED*. Their inclusion in the cheaper and smaller work in a manner faithful to their original spelling is a feature of the *Shorter Oxford* that is not duplicated in any other dictionary within its price range, and is only surpassed by the *OED* itself.

Idiomatic phrases such as *to make a balk, to have a bone to pick with one, to break on the wheel, to blow the buck's horn, to be in the gazette*, etc., are given with commendable copiousness. The extent to which combinative expressions as *barrier-treaty, blood-baptism, bucket-lift, bucket-pump, circuit-breaker, finger-brush*, etc., are included is likewise gratifying.

The definitions are as a rule clear, concise, and adequate. Where terms of United States origin are dealt with, however, the treatment is sometimes not quite up to the mark. Bowie-knives are not now-a-days carried as weapons "in the wilder parts of the United States." To *buck* a person did not mean merely "to lay across a log." A *horse-boat* was not a boat drawn by horses every time. Stetson hats originated in this country, but American users of the *Shorter Oxford* will probably be surprised and interested at such a definition as "A slouch hat worn by soldiers of the Australian and New Zealand forces."

The pronunciations given are of course those current in England and in many instances these differ markedly from what good usage in the United States demands. Although the *Shorter Oxford* in a great many instances points out the American origin or provenience of certain words and meanings which it records, it does not attempt to discriminate between British and American pronunciation.

Naturally the vocabulary is not as modern as it could well have been made if the historical plan had not been followed in the making of this dictionary. Under the limitations which the historical method imposes it is surprising that as many modern expressions as there are were included.

One is likely to come away from an examination of the work in full agreement with Doctor Onions, who in the Preface of the preceding edition wrote: "For those who possess the great Oxford Dictionary the 'Shorter' will serve as a key to its treasures; for those who do not it will form the only possible substitute."

University of Chicago M. M. MATTHEWS

The Personality Conception of the Legal Entity, by Alexander Nékám. 1938. Cambridge: Harvard University Press. Pp. 131.—The author attempts to show that the personality theory as a scientific observation of legal phenomena is based on emotionalism, is illogical and is contradicted by history. Not only that, —the theory has led to a denial of rights to entities which were really the subjects of rights, simply because its adherents recognized only those entities which had at least a certain minimum number of the rights possessed by the individual human. On analysis, says the author, it is found that legal entities, whether human or non-human, depend solely upon their social importance for legal rights. The individual is vested with a great many rights not because of "natural" law but because he is important socially; the time may come when the individual may be divested of his rights simply because a new social evaluation of him will show him unimportant.

The author admits that rights cannot be divorced from human beings, because will is necessary to use and protect rights and only the human being has will. The person who is entrusted with the protection and realization of the right he calls the "administrator of the right." But, he says, only as administrator is the human necessary to a right. Rights are not conferred upon a subject because it has personality or will. Anything, whether existing or simply thought to exist, may be the subject of rights so long as the society considers it of sufficient social importance to have rights. The subject of rights therefore has only a passive role in the law. That the normal adult is both a subject of rights and the administrator of those rights is merely a coincidence and does not prove that man alone is the subject of rights.

Mr. Nékám contends that the use of the word "person" to describe a subject of legal rights leads to much confusion. This word, he says, has a double meaning. On the one hand it means a human being and on the other an entity having legal rights. The first meaning has been infused into the second and thus the use of the word has fostered the misleading and inaccurate concept that the individual is the "natural" subject of legal rights. To avoid confusion, the author proposes the term "legal entity," which "does not convey a double meaning, but clearly indicates, at the outset, the artificial, man-made character of every legal concept."

The book is interesting. Whether it makes out a case is something else. One would doubt that it clarifies the subject of jurisprudence.

Chicago GERHARDT S. JERSILD

Sweden: A Modern Democracy on Ancient Foundations, by Nils Herlitz, 1939. Minneapolis: University of Minnesota Press. Pp. xiii, 127.—The lawyer interested in Constitutional Law, as well as the one who finds Administrative Law a field of fascinating current importance, may be amply repaid by a perusal of this compact little volume with its most up-to-the-minute and authoritative analyses of Sweden's problems and accomplishments. In at least two respects, as suggested above, it is of interest to lawyers, although it does not pretend to be a book upon Swedish courts and laws in general. There are apt comparisons and contrasts made throughout the chapters between Sweden and the United States in the fields of government and law. It may come as a surprise to many of us to learn that the prototype of a written constitution is discernible in a certain Swedish law of the year 1634, and that Sweden's first constitutional law on freedom of the press dates as early as 1766. There is included a good summary of the manner in which reviews of decisions and actions of administrative boards are effected in Sweden—a topic of increasing significance to us since our Supreme Court has been recently speaking with some cogency upon this phase of Administrative Law in the United States. The book is based upon a series of lectures which Mr. Herlitz delivered in this country a year ago this spring. The style is lucid, logical, concise and straightforward, without any literary tricks or dalliances.

HUBERT E. NELSON
University of North Dakota School of Law

The American Prison System, by Fred E. Haynes. 1939. New York: McGraw-Hill Book Co. Pp. vii, 377.—*Crime and Society: An Introduction to Criminology*, by Nathaniel F. Cantor. 1939. New York:

Henry Holt & Co. Pp. xiii, 459.—Professor Hayes of the University of Iowa describes in *The American Prison System* the various types of penal institutions now in use, their administration, their problems, and the techniques involved in the punishment and reformation of inmates. Pessimistically, the author notes that most of our prisons are still in the hands of politicians who are doing little for their prisoners and in fact do not know what to do.

More optimistically, he finds that the Prison Industries Reorganization Administration has had a beneficial influence on the prison systems of eighteen states. Furthermore, there is a tendency to minimize the role of the fortress prison whose regimentation and routine unfits the inmate for life outside. Medium and minimum security community prisons, with emphasis on character building through inmate participation, are releasing better citizens than ever came from the old cell block. Advanced experiments in penology, such as the forestry camps of Wisconsin, deserve public interest. Probation and parole show good results when skilfully used. Massachusetts now has four times as many offenders on probation as behind prison walls. The author praises Massachusetts and New York for having the most satisfactory probation systems, and New Jersey for the best parole administration.

This book is without value for the advanced student because much of it is quoted from familiar sources. The rapidly shifting prison panorama has also made much of its information obsolete. It is, however, an interesting book, furnishing a good introduction to its subject.

Crime and Society, by Professor Cantor of the University of Buffalo, is wider in scope and more analytical. The author describes present practices in the administration of criminal justice and points out basic conflicts between traditional beliefs underlying these practices and more scientific ideas of today. Changes are indicated which must be made if these conflicts are to be removed. Progress will be slow, he admits, because the development of rational procedure is limited by culture conflicts. The current administration of justice primarily reflects the social and economic institutions to which the legal machinery is subordinate. Penal codes have not been altered to deal with radically new situations because the emotional attitudes of the community have no changed basically.

The author states, nevertheless, that the administration of criminal justice in adult courts represents one of the most pronounced cultural lags. By way of improvement he advocates more frequent prosecutions by information, more extensive use of the summons, adoption of the public defender system, permission for defendants to waive jury trial, and convictions based on less than unanimous jury verdicts. He approves the development of administrative law to replace penal sanctions. Fundamentally, he believes in the individualized treatment of the offender rather than his punishment, and recommends therefore that the function of determining guilt be separated from the function of imposing sentence and be given to a disposition tribunal consisting of lawyers and social scientists. Discretionary powers now granted to parole boards in California and Utah receive his praise.

Crime and Society is ably written and is provocative. The index is inadequate; for instance, no reference is included to the American Law Institute, although it is mentioned in the text. The example of "dynamic case work" presented in the appendix is scarcely convincing to one outside the psychiatric sphere.

JAMES HARGAN

New York City

The review of Chester C. Maxey's *Political Philosophies*, in the June number of the JOURNAL, was by Victor S. Yarros.

Cardozo and the Frontiers of Legal Thinking, by Beryl Harold Levy. 1938. New York: Oxford University Press. Pp. 315.—The late Justice Cardozo has been claimed by the advanced liberals, even though on certain occasions he disappointed them and voted with the so-called conservative members of the United States Supreme Court. The claim is valid enough, provided we bear in mind that Cardozo was a scholar, a philosopher, a quiet, gentle, modest man who led a sheltered and privileged life. The work before us, written by a distinguished member of the New York Bar, places Cardozo in exactly the right light, and shows that tags and labels of the market place, or of rough and hasty journalism, can not and should not be applied to rich, complex personalities who love wisdom and endeavor to be guided by it despite appeals to strong emotions.

Cardozo, according to Mr. Levy, was neither a rebel nor a worshipper of precedents and settled rules. He was a "neo-realist" in jurisprudence, and a pragmatist by nature and reflection. He fully recognized the human or personal factor in what we call case law. Judges are not always as detached and impartial as they imagine they are. Divergencies in the interpretation of organic and other laws are often attributable to bias, environment, temperament. And Cardozo frankly faced the fact that judges can and do "make law" while interpreting it. That fact obviously militates against the *certainty* of the law, but Cardozo gradually became reconciled to *un*certainty, because he saw that it was inevitable, the judicial process being what it is.

Mr. Levy's analysis of Cardozo's judicial opinions and arguments leaves no doubt as to the soundness of his conclusion—namely that Cardozo was eminently judicious in his progressivism; that he "was neither iconoclastic nor quagmired in the past." Respect for traditions and long-accepted principles did not prevent him from steadily expanding his horizon in the interest of justice and righteousness. He was not as bold as Holmes, and never was known as a great dissenter. On the whole, however, his influence made for an ethical and sociological approach to the construction and application of the law.

More than half of the volume is devoted to selected cases in which the opinion of the New York Court of Appeals was written by Cardozo. Only one of his opinions as Associate Justice of the United States Supreme Court—in the case of the social security act's provisions for old age benefits—is included. The New York cases cover equity, criminal law, torts, evidence, partnership, procedure, wills, domestic relations, etc. To study Cardozo's reasoning in the opinions in these cases is, in truth, a liberal education.

The book is certainly a "must" for law libraries and schools of law. What splendid lectures enlightened professors of law will be able to deliver on the matter and manner of the opinions selected by Mr. Levy!

The Handbook of Latin-American Studies: A Selective Guide by a Number of Scholars, edited by

Lewis Hanke. 1938. Cambridge: Harvard University Press. Pp. 635.—Latin America, thanks to the Pan-American movement, certain alarming developments in Europe and Asia, and the menace of war in the western hemisphere despite the two oceans which, in the past, rendered the Americas safe and secure against invasion, is now receiving a great deal of favorable attention in the United States. The old attitude of condescension, or of poorly disguised contempt for weak, small, mercurial neighbors addicted to insurrections and dictatorships, is giving way to respect and a sincere desire to cultivate with them relations of amity and genuine reciprocity.

Naturally, the new attitude implies more and better knowledge concerning Latin America—not merely information regarding imports and exports, or investments and opportunities for capital and enterprise, but information about law, government, science, the fine arts, exploration and discovery, history and education in the countries collectively known as Latin America. To the numerous groups seeking and requiring such knowledge, the Handbook of Latin-American studies is invaluable. It is indeed a remarkably comprehensive, though selective, guide-book. The contributors are scholars or statesmen who take pains to supply important and interesting material to the volume because they wish to aid a constructive and progressive movement. There are some general articles in the Handbook, including one by Secretary Cordell Hull, and many special ones. The matter is well classified and the bibliography for each subject covered is surprisingly rich.

The section on law and procedure should particularly interest lawyers, either from a cultural or scientific point of view or by reason of professional connections with and litigation in Latin America. Workers in the field of the social sciences and the humanities will also be grateful for the Handbook, which, by the way, is free from propaganda and lets the significant facts speak for themselves.

John Marshall Law School VICTOR S. YARROS

The International Protection of Literary and Artistic Property, in two volumes. Vol. I: International Copyright and Inter-American Copyright. Vol. II: Copyright in the United States of America and Summary of Copyright Law in Various Countries, by Stephen P. Ladas. 1938. Vol. I—pp. xlix, 679. Vol. II—pp. ix, 683 to 1273. New York: The Macmillan Company.

Dr. Ladas has done something unique for American copyright law by showing that it is an integral part of copyright law throughout the world. By presenting the practical problems of copyright protection as much the same in all countries, he has very ably stated our national and international problem, and has given us a long lead in determining the answers. A text-writer need no longer apply an isolationist attitude to what has often been considered a completely American phenomenon.

The title of his work "The International Protection of Literary and Artistic Property" leads one to think it deals exclusively with copyright relationships between various nations. This is true only of Vol. I which treats of "International Copyright and Inter-American Copyright." Vol. II covers, and I use this word "covers" advisedly, "Copyright in the United States." It also gives a summary of the copyright laws of most other countries.

In the second volume a complete treatise on American copyright law is set forth in less than two hundred pages. Its brevity is effected by a style similar to the Greek philosophers'. Sentences contain the quantum of thought which, in this age of linotype machines, is more frequently found in paragraphs. The essence of the work, indeed, is thought rather than mere information. Thought without information is dry, yet this is by no means an arid work. Its conciseness is in part due to the fact that it is not a compendium of cases, or of quotations from cases, though it refers succinctly to pertinent authority. Neither is it a U. S. C. A. nor a glorified annotation of a statute. It is written on the very reasonable assumption that its readers can use the digests and the U. S. C. A. when further cases are needed. It is, in fact, a digested whole which states and discusses the various problems that arise in connection with copyrights from two points of view—that of a scholar, with a philosophical bent, and that of an experienced practitioner. This dichotomy is resolved because Dr. Ladas himself is both a philosophical scholar and an experienced practitioner. He is forthright in his treatment of both points of view. He does not hedge on controversial points and when he has a conclusion he states it as such, directly, almost bluntly, supported by thought and reasoning. Needless to say, he does not always agree with the courts or other authorities.

Before detailing any matters in the "American" section, I must advert to Vol. I. No one pretending, or aspiring, to knowledge of copyright law can afford to miss reading the sixty-seven page "Introduction." The "Introduction" discusses the "Nature and Theory of Author's Rights," as well as matters of historical development. Courts, the Copyright Office, clients and lawyers, in working with copyright matters, often rely upon certain unstated fundamental conceptions. Dr. Ladas exposes these conceptions for our inspection. In doing so he does not hesitate to set forth his own position, which is the one upon which many of us, consciously or unconsciously, have been acting:

> "This pragmatic conception of copyright has governed the present study of the problems of international regulation and protection of author's rights. It is believed that this is also the tendency of modern copyright legislation." (p. 12).

The mysteries which surround the International Copyright Union are dispelled in the major portion of Vol. I. The remainder of the volume is devoted to a discussion of the little known Inter-American Conventions. This volume together with chapter 12 of Vol. II on American "International Relations" will give to an American practitioner a clear picture of what he should do when his problems are not local. The rationale of Sec. 8 of the United States Copyright Act (dealing with non-resident aliens and their privilege of United States copyright) is apparent upon a reading of these three items.

Dr. Ladas dislikes the formalities attached to obtaining copyright. Practitioners are aware of the naivetè amongst otherwise intelligent business men in their desire for a paper, a seal or ribbon showing that they have obtained a "right" from the Government. Yet the strict formalities of obtaining United States copyrights, and the rigor with which American courts compel compliance with their formalities, (see Chap. VI of Vol. II where they are excellently set out) contrast unfavorably with the virtual absence of formalities and decoration in copyright under the International Copyright Union. One of Dr. Ladas' main criticisms of the

Pan American Copyright Conventions is the requirement of formalities.

However, appreciation of these views cannot blind one to the fact that the practical advantages of our public listing in the Copyright Office would be lost to the public if all formalities were dispensed with. It is significant to note there has been an increasing demand by owners and the public for a change from the common-law protection of trade-marks to a formality requiring public listing. Such a development has been largely completed in Great Britain.

Dr. Ladas has been criticized in a book review[1] for not adopting what is termed therein a "property" theory of copyright. A contention was made and repudiated by the English courts in Queen Anne's time that copyright is "property." Neither the English nor American courts have since changed this repudiation.[2] The copyright laws of both countries, except the American "common-law copyright," are purely the creatures of statutes, and the statutes were based on practical necessities and desires rather than on theoretical concepts The book reviewer's objection seems to be one of terminology rather than of substance. But Dr. Ladas holds no brief for terminology and, as he points out, (p. 2 of Vol. I), neither the term "copyright" nor "property" completely describes those rights and remedies which we call "copyright."

If the criticism is intended to be one of substantive law, I believe the intent of the so-called "property" theory is to term copyright "property," and then by analogy—that bar sinister of logic—claim for copyright attributes of "other" forms of "property." Aside from being unfortunate, this is unnecessary. Dr. Ladas' functional approach provides for progress in copyright protection, including the vital element of protection for the public, and he is not loath to make suggestions for improvement. A pertinent example of his interest in and understanding of the faults in the present copyright protection is his discussion (in Sec. 395 ff. of Vol. II) of various proposed changes in the current United States statute.

I regret that Dr. Ladas has not expanded his reference to the post-Colonial and pre-Constitutional copyright acts of the various States (p. 19), and particularly that well drafted and interesting one of South Carolina.[3] From such statutes, we can obtain some idea of what "copyright" meant when placed in the Constitution, and thus leaven thinking about copyright and proposals for its development.

The name "Harvard Studies in International Law" is akin to a trade-mark of a well established satisfactory product. One expects a good book under that name. This is more than just a good book; it is a striking instance of a product which enhances the trade name under which it is sold.

LESLIE D. TAGGART

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1. 48 Yale L. J. 712.
2. *Wheaton v. Peters*, 8 Pet. (33 U. S.) 591.
3. Act No. 1221, 1784, reprinted in S. C. Stats. at Large, ed. by T. Cooper, Vol. IV, pp. 618-620 (Columbia, S. C., 1838).

Leading Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Administrative Law and the Bar, Jacob M. Lashly, 25 Virginia L. Rev. 641. (Ap. '39; Charlottesville, Va.)

Administrative law "absent judicial review," is apparently thought of as a product of absolutism and at war with separation of powers and democracy. The judicial review desired appears to be at least that embodied in the proposed administrative law bill of the American Bar Association. Apparently, this bill is thought to require more than that the finding of an administrative board be supported by "substantial" evidence before a court would permit it to be effective. The fact that the Supreme Court wrote the word "substantial" into the NLRB Act is considered as not very significant.

CONSTITUTIONAL LAW

Legislative Pardons, Henry Weihofen; Legislative Pardons: Another View, Max Radin, 27 California L. Rev. 371 (My. '39; Berkeley, Calif.)

Weihofen and Radin ably present an interesting debate. If the California legislature had passed a bill that would have granted a pardon to Tom Mooney would the action have been unconstitutional? What would be the result in other states and in the United States? Weihofen concludes that it is within the power of the legislature of every state as well as Congress to enact general laws of pardon and amnesty, and also, where not specifically prohibited from passing special laws, to grant pardons in individual cases. He admits that "the great weight of judicial dicta agrees that the constitutional grant of the pardoning power to the executive is exclusive," but argues that this is undesirable and almost wholly unsupported. Recognition of the legislative power to pardon would result in two benefits: (1) remove doubt as to "the vital power to declare amnesties by legislative act," and (2) remove an obstacle to many desirable legislative acts, such as probation and parole, which have only a slight relation to pardon but which have been held unconstitutional by the courts too frequently.

Radin states that Weihofen has failed to distinguish sharply between pardon and amnesty. "The one remits punishment to a named person. The other remits punishment for an offense, without particular reference to those who committed it." Radin concludes that it is difficult to raise any doubt that the national constitutional convention understood that the power of the President to issue individual pardons is exclusive. As for the states, it is a matter of the separate state constitutions.

Weihofen replies that Radin has erred in asssuming that the American law has distinguished between pardon and amnesty. "They are lumped together, as part of one power, vested in the same authority."

EVIDENCE

The Reform of the Law of Hearsay, S. J. Helman, K. C., 17 Canadian Bar Rev. 302. (My. '39; Ottawa, Ont.).

A part of the English Evidence Act of 1938 is considered and criticized as too conservative in its reform. This Act permits the introduction of "any statement

made by a person in a document" . . . if the maker had personal knowledge . . . and is unavailable as a witness. The objection is to the limitation that the statement must be contained in a document. Reference is made to the similar Massachusetts statute of 1898, which, however, does not require that the declaration be in writing. The author favors the adoption by the provinces of Canada of the Evidence Act of 1938, with a modification that agrees with the recommendation of the committee that advised the United States Supreme Court on its Rules for Civil Procedure. This recommendation would admit either an oral or written statement if the declarant is unavailable and if the statement "was made in good faith before the commencement of the proceeding and on the declarant's personal knowledge."

LABOR RELATIONS

Politics and Labor Relations—N. L. R. B. Procedure, Walter Gellhorn and Seymour L. Linfield, 39 Columbia L. Rev., 339. (Mr. '39; New York City.)

This "appraisal" of the common criticisms of the procedure of the National Labor Relations Board occupying fifty-seven pages is an exceptionally thorough job. The "appraisal," however, is a defense of every criticism. All of the critics are wrong on all of their arguments. True, in the last paragraph the authors make a slight, very slight, admission that, "We would not maintain that the NLRB has never erred or that its practices leave no room for improvement." . . . As to the issuance of subpoenas, there is a suggestion that the present rule could be changed to avoid a claim of discrimination. Aside from this, one gets the impression that the chairman of the board in a speech admitted more to have been wrong than is admitted by Gellhorn and Linfield. Thus, despite their claim to objectivity, many likely will think that the authors are unconscious partisans and will point to their statement, "that they are favorably disposed toward the NLRB and would more readily detect its virtues than its defects." This defense of the Board includes an extensive criticism of the U. S. Supreme Court for its two recent decisions which refused to enforce Board orders because they were not based upon substantial evidence. (Columbian Enameling & Stamping Co. and Sands Mfg. Co. cases.) The criticisms considered at length are: (1) reckless charges of unfair labor practices are made against employers; (2) employers do not have fair notice of charges against them; (3) there is a failure to give notice to appropriate parties other than respondent; (4) the Board does not afford a fair trial to the employer; (5) common law rules of evidence are not binding and the findings of the Board, if supported by substantial evidence, are conclusive; (6) the rules as to the issuance of subpoenas are unfair and discriminatory; (7) the Board's decisions are made by its employees; and (8) the Board is the combination of prosecutor, judge, and jury.

Senator Burke's article in 33 Illinois L. Rev. 648 stating why the NLRB Act should be amended is directed to both the procedure of the Board and the substantive provisions of the Act. The indictment is in very strong language. The NLRB is not a just judge but a short sighted partisan. The employee must prove himself not guilty of the charges against him before a Board that is complainant, investigator, prosecutor, and judge. The Board should be compelled "to observe reasonable rules of evidence" and base its findings "upon the weight of the evidence." A "premium" should be put on its good behavior by giving respondents "the right of transfer of hearings to the Federal District Courts." But Senator Burke sets forth little or no proof for his charges. His article is what one might expect in a speech before the Senate.

In the same issue of the Illinois L. Rev. at page 658, Professor A. H. Frey argues that the NLRB Act should not be amended at the present session of Congress. Four proposals are considered and rejected because they would not promote the purpose of the Act. The period of effective operation of the Act "has been far too brief to justify any sound judgment in favor of amendment."

The first installment of an article on "Judicial Review of the National Labor Relations Board," by Nathaniel L. Nathanson and Ellis Lyons in 33 Illinois L. Rev. 749, is an analysis of the Fansteel decision. The objectivity and poise of the authors is impressive. Here seems to be a discussion of a controversy, provoking in its emotional capacity, in the best judicial manner.

LEGAL LITERATURE

A Petition of Right: Archer-Shee v. The King, Edwin R. Keedy, 87 U. of Pennsylvania L. Rev. 895. (Je. '39; Philadelphia, Pa.).

The Archer-Shee case was tried in 1910 and apparently has become a famous case. Professor Keedy attended the trial and he decided to add to the growing literature upon the case. Aside from a preliminary statement of the factual background, of a few comments of the author, and some discussion of the province of a petition of right, the major portion of the present article is a copy of what appeared in the London Times. The result is an article of absorbing human interest which should appeal to lawyers as a satisfactory relief from the daily grind.

Literature In Law Books, William S. Holdsworth, 24 Washington University L. Qu. 153. (F. '39; St. Louis, Mo.)

Sir William Holdsworth writes interestingly upon the thesis "that there is literature in law books which, though, relatively to the great mass of law books, small in quantity, yet is of such a quality that it adds appreciably to the distinction of the large body of great English prose." The small quantity is explained by the statement "that though law books often contain straightforward, well-reasoned, and clear expositions of principles and rules, they are not as a rule literature." Selections are presented in the main from the following: Glanvil, Bracton, neither of whom wrote English, Fortescue, Coke, Bacon, Mansfield, Stowell, Blackstone, James, Bowen, MacNaghten, Sumner, Maitland, and Pollock. It would be valuable if Sir William would write a paper giving his views of American law writers.

LEGISLATION

A Malapropian Provision of State Constitutions, Thomas F. Green, Jr., 24 Washington U. L. Qu. 359 (Ap. '39; St. Louis, Mo.)

Consideration is directed to a provision in half of our state constitutions that a legislature shall pass no local or special act in any case where a general act can be made applicable. Ten evils of local and special legislation are stated. A general act is conceived of as "one that applies to all persons or things of a class legitimately constituted." Accordingly, a general act "is applicable to every situation save only that where

the desire of the legislature is to give special privileges to individuals or groups less than a class." From this premise arises the conclusion that it is a fallacy to assert that there can be a need for legislative action which cannot be satisfied by a general act. Thus, half of our state constitutions have incorporated a fallacious idea, which in turn has been incorporated in the model state constitution prepared by the National Municipal League. The constitutional provision on this subject that appeals to the author is an amendment adopted in Arkansas in 1926 providing that, "The General Assembly shall not pass any local or special act." No claim is made that this will eliminate the problem of judicial construction. But there was a reduction of local or special legislation in Arkansas from nearly 4,000 pages in 1914 and nearly 2,000 in 1923 to "about a half-dozen acts in 1937." Why the half-dozen were passed is not explained. Apparently the courts did not have a chance at them. "There must be differentiation, but the requisite differentiation can be accomplished by utilizing administrative or judicial machinery, local option or home rule, and classification."

MUNICIPAL SECURITIES

A Warning Signal for Municipal Bondholders: Some Implications of Erie Railroad v. Tompkins, Irwin Long, 37 Michigan L. Rev. 589. (F. '39; Ann Arbor, Mich.)

The struggle of municipal bond holders for security of their securities forms a large chapter in the history of the conflict between short-term, popularly elected state judges and good-behavior, appointive national judges. This struggle is reviewed briefly in discussing the decision in Gelpcke v. Dubuque which established a noteworthy protection for municipal securities even if it was at the expense of not following the "rules of decision" statute, to-wit section 34 of the Federal Judiciary Act of 1789. Gelpcke v. Dubuque was an application of the doctrine of Swift v. Tyson, which has been overruled by Erie Railroad v. Tompkins. That leaves a big question: "Now that Swift v. Tyson has been declared erroneous, what may a holder of municipal bonds expect will be the future course of decisions on questions so important to his security?"

PROCEDURE

Obligatory Jurisdiction Of The Supreme Court: Appeals From State Courts Under Section 237 (a) Of The Judicial Code, Seymour J. Rubin and Sidney H. Willner, 37 Michigan L. Rev. 540. (F. '39; Ann Arbor, Mich.)

What rule determines whether a case decided by a state court of last resort may be heard by the Supreme Court of the United States by certiorari, which is discretionary, or by appeal, directed to the obligatory jurisdiction of the court under section 237 (a) as amended in 1925? The answer would determine the line between two decisions, Jett Bros. Distilling Co. v. City of Carrollton and Dahnke-Walker Milling Co. v. Bondurant. These decisions purported to hold that there could be a review "as of right" when the validity of a statute was questioned but not when the validity of a mere exercise under a statute was the question for decision. But experience has proved that this distinction is a very subtle one. A similar difficulty has arisen in the application of section 266 of the judicial code. After an extensive review of the cases where the court has had this subtle distinction before it, it is concluded (1) that there is no ready answer to the question; (2) that the obligatory jurisdiction of the court has been narrowed; and (3) that the Jett case "has been a means of making, to some extent, the obligatory jurisdiction of the court discretionary."

TORTS

Intentional Infliction of Mental Suffering: A New Tort, William L. Prosser, 37 Michigan L. Rev. 874. (Ap. '39; Ann Arbor, Mich.)

"It is time to recognize that the courts have created a new tort" which "consists of the intentional, outrageous infliction of mental suffering in an extreme form." But the intentional infliction does not require "an actual desire to make the plaintiff suffer." It is sufficient if the defendant "must have believed" the mental disturbance to be "a necessary incident" of and "substantially certain to follow from defendant's act." Reasons have been given for the reluctance of courts to recognize this tort: (1) difficulty in the measurement of damages; (2) mental suffering lacks reasonably proximate causal connection with defendant's act; (3) the danger of fraudulent and trivial claims. The last mentioned reason is the only one that has substantial merit. We are assured, however, that: "No case has been found permitting recovery in the absence of evidence that the plaintiff's mental disturbance was extreme, with convincing objective testimony to attest its genuineness." But we are not reassured by the information that: "Nearly all of the plaintiffs have been women, usually in the delicate condition whose standardized consequences have typified mental suffering cases with the 'customary miscarriage.'"

R. L. MAITLAND, K. C.
Representative of Canadian Bar Association—
Speaker at Annual Dinner, Thursday, July 13

AMERICAN BAR ASSOCIATION JOVRNAL

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THE MANTON CASE

Occasionally the opportunity comes to a public officer to illumine a distressing situation with a heartening analogy which throws the true perspective into bold relief, like an airway beacon on a great plain. Such a service to Anglo-Saxon justice was rendered by Judge W. Calvin Chesnut on June 20th when, in pronouncing sentence in the Manton case, he referred to "the fortunate fact that the particular case is an isolated one which has had no such conspicuous parallel in the history of English and American high Judiciary since Francis Bacon, then Lord Chancellor of England, was deprived of office for a similar cause more than 300 years ago."

In giving voice at this time to the deep feeling of judges and lawyers, we do not disregard the fact that, although convicted and sentenced, the defendant has the right of appeal and during the pendency of an appeal is still entitled to the presumption of innocence.

But even if he be deemed innocent of the particular offense charged, we cannot escape the feeling that something held sacred and apart in American life has been profaned by the conduct revealed in the accused's own testimony. That testimony showed that at times when litigants should have been seeking only impersonal and impartial justice in the Court over which the accused then presided, a maze of Manton-controlled corporations had participated in the financial advantages derived from great loans made with the knowledge of the judge by litigants whose cases were pending before him. Even such a pointed reminder as Judge Chesnut gave, from his familiarity with the long history of the high Courts of England and America, could not wholly dispel the grave concern which the incidents provoked. It seems appropriate to give here for information his clear version of the evidence, as he stated it at the close of the case:

"Viewed as a whole, the evidence in the case is susceptible of the following interpretation. The defendant, a high judicial officer of the United States Government, was possessed of a great personal fortune which, being largely invested in corporate equities, was seriously threatened by financial conditions existing a few years ago. In the attempt to save his fortune he violated the most fundamental feature of his judicial office which requires absolute impartiality and personal disinterestedness in the performance of official duties, and agreed to use the power and influence of his great position to procure large sums of money by loans or otherwise from litigants, to bolster up his fading fortune.

"It is unfortunately true that in other walks of life other persons have yielded to the temptation to use unlawful methods to avert financial disaster in a period of abnormal economic conditions; but this, of course, affords no excuse for the defendant in this case. All public office is a public trust; but the judicial office is even more than that—it is a sacred trust. It is abhorrent to our conception of public justice that a judge should be influenced by the idea of personal profit in deciding the controversies of other people. It is vital in our form of government that public confidence in the integrity of the Courts be maintained, and to that end that our judges enjoy, and by their conduct deserve to enjoy, the confidence of the people.

"That the defendant departed from this rigid requirement of his judicial duties has shocked the public generally and particularly the bench and Bar of the country."

Enemies of our Constitutional system of appointment and tenure of federal judges, in force for a century and a half, are seizing upon this unhappy and isolated incident as a reason for its abandonment and the substitution of a different system, but those who know the history of other judicial systems and the uniform and constant success with which ours has been administered will find no reason to concur in the proposal to discard it. Our system of choice of Federal judges relies for its vindication on the almost unbroken success which it has achieved. What other human political institution can show a better—even as good a record? Make what deduction you will, and it still remains as good a plan as could

have been devised by the "brain and purpose of man." As former Attorney-General Mitchell told the Junior Bar Conference last month, if the President and the Attorney-General of the United States cannot be trusted to appoint, and the Senate of the United States to confirm, judges of integrity, independence and disinterestedness as well as ability, who could be depended on to make a better selection? Human nature sometimes fails in the hard tests; and this is true even of judges, regardless of the care with which they are chosen.

This unfortunate case emphasizes a distinct moral which has long been recognized, that the members of the judiciary should not concern themselves with the active conduct of business, directly or indirectly. The judge must not only really be above suspicion, but he must also appear to be above suspicion. In such cases, as has been said of politics, "appearances are realities." Active conduct of business affairs must inevitably give rise to injurious comment which may reflect on the honor of the Bench.

This does not mean that the judge who happens to have resources must sell all he has and give it to the poor. But it does mean that, in discharge of his duty, he should act as though he had done just that. This is exactly how the overwhelming number of Federal judges have always acted and may be expected to act.

A NEW FIELD OF USEFULNESS FOR THE AMERICAN LAW INSTITUTE

The American Law Institute has had an existence of more than sixteen years. It was formed to prepare and publish a restatement of the common law. Much of this work has been accomplished. Restatements in seven branches of the law have been prepared and published, and the preparation of three others is under way.

Much, however, remains to be done. There is insistent demand for the completion of the Restatement of the Law of Property, and of Security, for a resumption of the work on Associations, and for an entry into the field of Personal and Domestic Relations, and other important branches of law.

There is little dissent as to the excellence of the work that has been done. Any other opinion would have been surprising in view of the plan consistently followed by the Institute. That plan has been to select an expert in the subject to be restated to whom has been given the interesting title "Reporter," and to associate with him a small group of advisers. Drafts are prepared by the Reporter and painstakingly considered by the advisers and Director at numerous conferences. Its work is then submitted to the Council. There it is scrutinized with the same care. When the draft has received the approval of the Council it is submitted to the annual meeting of the Institute. If it receives the *imprimatur* of the Institute it is released for publication.

Emphasis should be given to the fact that in this work there is collaboration of all three branches of the profession, practicing lawyers, judges and teachers of the law.

Naturally the courts, many of whose judges have participated in its preparation, look upon the Restatement as a thread to guide them through the labyrinth of conflicting decisions.

The Supreme Court of Mississippi has declared that it will always follow the Restatement whenever no Mississippi statutes or controlling decisions are applicable. So many others of the courts of last resort have cited the Restatements with approval that a general judicial accord is clearly apparent.

With the emphasis of understatement it may be said that the Restatement is the greatest accomplishment of American legal scholarship.

By no means the least of the advantages which come from the Restatements of the unwritten law, is one which has not been advertised and perhaps not been generally appreciated. When the lawyer encounters a problem as to a question of general law which has not been crystalized into definite and certain form by statutory enactment or by repeated and uniform judicial declaration, thought must be given to the fundamental principles involved. Reflection must precede research. Failure to take a preliminary survey of the philosophy of the law before recourse is had to digests, leaves one without a compass to guide him in his voyage over the troubled sea of conflicting judicial precedents.

The Institute has not entirely confined itself to the work of restatement. It has created a Model Code of Criminal Procedure, already in force in a considerable number of states. It is now making a study of our criminal law administration which affects the youth group between the ages of sixteen and twenty-one, for the purpose of suggesting such changes as are advisable in order to make the protection of society, rather than the punishment of the young offender, the primary object. It is also engaged in preparing an act on Contribution Between Tort Feasors and a Model Code of Evidence. Indeed, it seems likely that in the future in-

creasing emphasis will be placed upon the improvement of the law by creating it, rather than by its mere restatement.

No one is properly equipped to create law unless he is thoroughly qualified to state it. In English-speaking countries this necessarily demands a thorough acquaintance with the common law.

For the task of creation, the Institute is already admirably accoutred. If it can complete the Restatement it will be perfectly equipped. Its leadership is unexcelled. It has had long experience in its work, for its membership, when allowances are made for the tithing of time, has been constant. Its technique has been perfected. In it has been forged a most effective instrument for the improvement of the law.

The work of the Institute has been made possible by grants from certain Foundations and individuals particularly interested in the social implications of the Institute's activities. The Carnegie Corporation has been exceedingly generous in the original and supplementary appropriations. The Institute is assured of sufficient funds to complete the proposed final drafts in the field of Security and the proposed Code of Evidence, and to enable it to hold its annual meeting in 1940 for the consideration of its latest work. Beyond this there is no definite financial assurance, but it must not be allowed to disintegrate or to rust in disuse. It is to be hoped that means may be found for the extended exercise of its splendid facilities.

QUEEN ELIZABETH SPEAKS FOR JUSTICE UNDER LAW

Many men make speeches about law and justice, but few of them state the fundamentals more simply and clearly than did the moving speech of Queen Elizabeth of the British Commonwealth of Nations, in laying on May 20th the foundation stone of the classic new building of the Supreme Court of Canada. In the presence of a great throng high on the cliffs which overlook the Ottawa River, this much-admired Queen gave eloquent voice to truths which should carry their lesson to rulers and leaders in every land.

"I am happy," said she, "to lay the foundation stone of a building devoted to the administration of justice in this great Dominion. Perhaps it is not inappropriate that this task should be performed by a woman; for woman's position in civilized society has depended upon the growth of law." It was reported on good authority that the striking sentence last quoted was interpolated by the Queen, at the last moment, in her own fair hand. She went on to say that—

"Canada is rightly proud of being a land governed by the rule of law. Her judiciary and the members of her legal profession have been true to the highest British traditions of bench and bar.

"It is fitting that on these heights above the Ottawa—surely one of the noblest situations in the world—you should add to the imposing group of buildings which house your Parliament and the executive branch of government a worthy home for your Supreme Court. Henceforth, on these river-side cliffs, there will stand in this beautiful capital a group of public buildings unsurpassed as a symbol of the free and democratic institutions which are our greatest heritage."

Then, speaking in French, Her Majesty concluded—

"In Canada, as in Great Britain, justice is administered according to two great dissimilar legislations. In my native land, Scotland, we have a law founded on Roman law; it springs from the same fountain-head as your civil law in the old Province of Quebec. In England, as in Canada's other provinces, common law prevails. At Ottawa, as at Westminster, both are administered by the Supreme Court of Justice. To me, this is a very happy augury.

"To see your two great races with their different legislations, beliefs and traditions uniting more and more closely, after the manner of England and Scotland, by ties of affection and respect and of a common ideal, is my fondest wish."

This utterance was a model of diction and of brevity for those who speak on public occasions. Thoughtful Americans will hope that all will heed Her Majesty's reminder that

"Woman's position in civilized society has depended upon the growth of law."

ARTICLES IN THE JOURNAL

As it is the policy of the JOURNAL to provide, within practicable limits of space, a forum for the free expression of the views of members of the Association on matters of importance to the profession and the public, and as a wide range of opinion elicits a representative expression of the varying views, the Association and the Board of Editors of its JOURNAL assume no responsibility for the views stated in signed articles, beyond expressing by the fact of publication a judgment that the contents of the article merit consideration by our readers.

Editorially the JOURNAL supports the policies and objectives of the Association as from time to time duly determined. The views expressed are not necessarily those of each member of the Board of Editors, and no particular member of the Board should be deemed responsible for them.

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS XXX, XXXI AND XXXII ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 2—One Form of Action

City of El Paso v. *I. Anson West, Trustee, et al.* (Circuit Court of Appeals for the Fifth Circuit, SIBLEY, HOLMES and MCCORD, Circuit Judges. May 23, 1939).

Although the new Rules abolished the old forms of action and substituted a single form of action, if the statute of limitations depends on the state law and that law refers to a form of action as determinative of the period of limitation, it is still necessary to determine what sort of case the pleader is presenting.

RULE 3—Commencement of Action

Francis J. Gallagher, et al. v. *Lawrence P. Carroll, et al.* (Eastern District of New York, BYERS, D. J., May 19, 1939).

Filing of the complaint with the court tolls the statute of limitations irrespective of the fact that the period of limitation expired before service of summons and complaint on defendant.

RULE 4—Process—Subdivision (c)—By Whom Served

In the matter of Pauline Evanishyn, etc., Alleged Bankrupt. (Southern District of New York, HULBERT, D. J., April 10, 1939).

Service of a petition for involuntary bankruptcy and the subpoena may be made by a person specially appointed by the court for that purpose.

2. The attorney for one of the parties should not be designated to make service of process in an action.

Subdivision (f)—Territorial Limits of Effective Service

J. W. Devier v. George Cole Motor Company, et al. (Western District of Virginia, PAUL, D. J., June 1, 1939).

In an action for personal injuries resulting from an automobile accident, service of process on a non-resident defendant by serving the state commissioner of motor vehicles under a state statute is valid even though the latter resided in another judicial district of the state.

RULE 7—Pleadings Allowed; Form of Motions—Subdivision (c)—Demurrers, Pleas, Etc., Abolished

Nina D. Murphy v. Puget Sound Mortgage Company, et al. (Western District of Washington, Northern Division, CUSHMAN, D. J., June 5, 1939).

A demurrer may be treated as a motion to dismiss. (Rule 12 (b)).

RULE 8—General Rules of Pleading—Subdivision (a) Claims for Relief

Alexander T. Macleod, et al. v. Cohen-Erichs Corporation. (Southern District of New York, HULBERT, D. J., April 27, 1939).

1. Allegations in pleadings based on conclusions rather than facts are sufficient.

2. In an action by trustee in bankruptcy to set aside transfers of assets of the bankrupt to defendant as fraudulent and preferential, an allegation that the transfers were made while debtor was insolvent with intent to hinder, delay and defraud creditors, is a sufficient allegation of fraud. (Rule 9 (b)).

3. Misjoinder of parties plaintiff is not a defense and, therefore, may not be pleaded in the answer. (Rule 21 and 8 (c)).

Subdivision (c)—Affirmative Defenses

Alexander T. Macleod, et al. v. Cohen-Erichs Corporation. (Southern District of New York, HULBERT, D. J., April 27, 1939).

Misjoinder of parties plaintiff is not a defense and, therefore, may not be pleaded in the answer.

RULE 9—Pleading Special Matters—Subdivision (b)—Fraud, Mistake, Condition of the Mind

Alexander T. Macleod, et al. v. Cohen-Erichs Corporation. (Southern District of New York, HULBERT, D. J., April 27, 1939).

In an action by trustee in bankruptcy to set aside transfers of assets of the bankrupt to defendant as fraudulent and preferential, an allegation that the transfers were made while debtor was insolvent with intent to hinder, delay and defraud creditors, is a sufficient allegation of fraud.

RULE 12—Defenses and Objections—Subdivision (b)—How Presented

Nils J. Nielson v. *Edward P. Farley, et al.* (Southern District of New York, PATTERSON, D. J., Jan. 12, 1939).

A seaman hurt on board ship brought suit against defendants as trustees in bankruptcy of the subsidiary corporation which owned the ship and also in their capacity as trustees of the parent corporation. Defendants had been discharged as trustees of the subsidiary corporation. *Held,* as court has no jurisdiction over trustees who have been discharged, motion to dismiss the complaint as against the defendants in that capacity should be granted.

United States of America, to use &c. v. *Edward Fay & Son, et al.* (Eastern District of Pennsylvania, DICKINSON, D. J., Apr. 25, 1939).

A motion to strike which has been filed for purpose of raising question of sufficiency should be treated as a motion to dismiss.

Harry A. Toulmin, Sr., et al. v. James Manufacturing Company. (Western District of New York, KNIGHT, D. J., May 8, 1939).

1. The filing of a motion to dismiss on the ground

of lack of jurisdiction over subject matter does not constitute a general appearance.

2. Compliance with state law requiring non-resident corporation to file certificate and designate resident person for service of process before doing business in the state, does not constitute such corporation a resident of the state for purposes of venue.

Nina D. Murphy v. Puget Sound Mortgage Company, et al. (Western District of Washington, Northern Division, CUSHMAN, D. J., June 5, 1939).

A demurrer may be treated as a motion to dismiss.

Subdivision (e)—Motion for More Definite Statement or for Bill of Particulars

Jacob Teller, et al. v. *Montgomery Ward & Co., Incorporated.* (Eastern District of Pennsylvania, KALODNER, D. J., Apr. 24, 1939).

1. In a patent suit plaintiff is entitled to a bill of particulars as to the particular patents or publications, together with dates thereof, to be relied upon in support of defense of anticipation. The furnishing of such information should, however, be made contingent upon plantiff's first filing a statement of dates when the invention of the patent in suit was first conceived and disclosed.

2. Defendant in a patent suit may be required to serve a bill of particulars as to what patents or publications will be offered in evidence to illustrate the prior state of the art.

3. A party may not refrain from supplying the information by bill of particulars merely because an insufficient answer might be construed as a contempt.

4. Production of records and articles for inspection should, technically, be sought under Rule 34 but if such discovery has been attempted by a motion for a bill of particulars no useful purpose is served by denying it. (Rule 34.)

5. Defendant in a patent suit may be required to state in a bill of particulars the names of persons involved in prior use or invention pleaded as a defense, even if such persons may be defendant's witnesses.

6. The provision of the new Rules that motion for bill of particulars is permitted only within 20 days after service of preceding pleading should not be applied in an action in which such 20-day period had expired befor the effective date of the Rules and the party making such motion has filed it within 20 days after the Rules became effective. (Rule 86.)

7. Motion for bill of particulars should not be denied solely because inquiries are multiple in form, if they are clear and understandable.

8. The fact that some of plaintiffs' patents have expired and that the only remedy for their infringement is at law is not a valid objection to a motion for bill of particulars in a suit begun in equity, since to prevent multiplicity of suits all claims should be disposed of in one action.

[EDITORIAL NOTE: The rulings of the courts in respect to scope and function of motions for bill of particulars seem generally to fall into two classes. One line of decisions permits the use of such motions for the purpose of obtaining information needed to prepare for trial. *Jessup & Moore Paper Co.* v. *West Virginia Pulp and Paper Co., et al.* (D. Dela., Dec. 1, 1938), 8 Bull. 2, 25 F. Supp. 598; *American LaFrance-Foamite Corp.* v. *American Oil Co.* (D. Mass., Oct. 27, 1938), 3 Bull. 3, 25 F. Supp. 386; *Rudolph Wurlitzer Co.* v. *Filben* (D. Minn., Nov. 3, 1938), 5 Bull. 4.

On the other hand, the second line of decisions holds that motions for bills of particulars should be restricted to such matters as are needed to enable the moving party to frame his responsive pleading, and that information required in preparation for trial should be obtained by various modes of discovery, such as interrogatories, depositions, etc. *Southern Grocery Stores, Inc.* v. *Zoller Brewing Co.* (S. D. Ia., Davenport Div., Feb. 4, 1939), 17 Bull. 6, 26 F. Supp. 858; *Tully* v. *Howard,* et al. (S. D. N. Y., Jan. 31, 1939), 23 Bull. 9; *Brinley* v. *Lewis* (M. D. Pa., May 1, 1939), 28 Bull. 11.

The decisions in the Eastern District of Pennsylvania seem to be split, Judge Kirkpatrick in *Fried* v. *Warner Brothers Circuit Management Corp.,* et al. (E. D. Pa., Jan. 25, 1939), 15 Bull. 4, 26 F. Supp. 603, adhering to the last mentioned rule, and Judge Kalodner in the instant case adopting the former.]

Anna A. Meehan v. *Schenley Distillers Corporation and Manufacturers Trust Company.* (Southern District of New York, HULBERT, D. J., Apr. 13, 1939).

In an action for conversion by a prior registered owner of a stock certificate against the present holder, claiming that the certificate had been wrongfully delivered to defendant without plaintiff's endorsement, knowledge or consent, defendant is entitled to a bill of particulars as to the circumstances under which the certificate left the possession of plaintiff and the particulars of the transfer.

Joseph Rosenblum v. Carl I. Dingfelder, et al. (Southern District of New York, MANDELBAUM, D. J., April 7, 1939).

1. Motion for bill of particulars was granted insofar as information sought was required to enable defendant to prepare his answer and denied as to other information sought, the court suggesting that such other information should be sought by discovery after issue joined.

2. The order directing production of documents should specify the time, place and manner of making inspection and copies thereof. (Rule 34).

Ethel Varey v. Paul Gaunt. (Southern District of New York, HULBERT, D. J., April 17, 1939).

A party who has moved for a bill of particulars and who is subsequently served by his adversary with notice to take depositions may be entitled to a bill of particulars as to some of the items before the taking of the deposition and the service of a further bill as to the others may be postponed till after such time. (Rule 26 (a)).

Oskar Piest v. Tide Water Oil Company, et al. (Southern District of New York, HULBERT, D. J., April 28, 1939).

1. No answer is required to a bill of particulars.

2. A party should not be required to produce correspondence between its unnamed subsidiaries and its adversary. (Rule 34).

Subdivision (f)—Motion to Strike

United States of America, to use &c. v. *Edward Fay & Son, et al.* (Eastern District of Pennsylvania, DICKINSON, D. J., Apr. 25, 1939).

1. Motion to strike is not proper motion to raise question of sufficiency. Such question should be raised by motion to dismiss.

2. A motion to strike which has been filed for purpose of raising question of sufficiency should be treated as a motion to dismiss. (Rule 12 (b).)

RULE 14—Third-Party Practice—Subdivision (a) —When Defendant May Bring in Third Party

Katherine Kravas, et al. v. *Great Atlantic & Pacific Tea Co.* v. *Peoples-Pittsburgh Trust Co.* v. *Joseph*

Davis. (Western District of Pennsylvania, SCHOONMAKER, D. J., May 23, 1939).

1. A third party alleged to be liable to plaintiff may be brought in by third-party process, even though the plaintiff and the third party are residents of the same state.

2. In an acton for personal injuries sustained on the sidewalk in front of defendant's store, defendant brought in the owner and mortgagee of the premises as third-party defendants. The latter moved to dismiss on ground that their alleged liability arose out of a contract separate and distinct from plaintiff's claim. *Held,* motion should be denied in view of the fact that the third-party defendants are or may be liable to either the defendant or the plaintiff for all or part of plaintiff's claim, and it is immaterial that such liability may be based on a separate contract.

RULE 15—Amended and Supplemental Pleadings —Subdivision (a)—Amendments

Walter F. Downey v. Edith S. Palmer. (Southern District of New York, HULBERT, D. J., April 18, 1939).

After plaintiff served reply, defendant was permitted to amend answer by pleading the statute of limitations.

Ralph Holland v. Majestic Radio and Television Corp., et al. (Southern District of New York, HULBERT, D. J., April 27, 1939).

When motion to dismiss is granted, a party may be granted leave to amend, in view of the liberal provision for the amendment under the Rules.

RULE 18—Joinder of Claims and Remedies—Subdivision (a)—Joinder of Claims

Walter F. Downey v. Edith S. Palmer. (Southern District of New York, LEIBELL, D. J., April 6, 1939).

To a defense of release, plaintiff replied that the release was obtained by fraud and asked for its cancellation. *Held,* defendant's motion to strike reply should be denied as plaintiff may assert additional claim in his reply.

Subdivision (b)—Joinder of Remedies; Fraudulent Conveyances

Harry Utesch v. *United States Fidelity & Guaranty Company, Baltimore, Maryland.* (Northern District of Iowa, Western Division, SCOTT, D. J., May 13, 1939).

An action on a fidelity bond will lie without waiting for an accounting to determine the amount for which principal is liable, in view of the rule which permits the joinder of such claims in the same action.

RULE 21—Misjoinder and Non-Joinder of Parties

Alexander T. Macleod, et al. v. Cohen-Erichs Corporation. (Southern District of New York, HULBERT, D. J., April 27, 1939).

Misjoinder of parties plaintiff is not a defense and, therefore, may not be pleaded in the answer.

RULE 24—Intervention—Subdivision (b)—Permissive Intervention

Peter J. Carpenter v. *Wabash Railway Company, et al.* (Circuit Court of Appeals for the Eighth Circuit, VAN VALKENBURGH, C. J., May 13, 1939).

It is a proper exercise of discretion to deny to a judgment creditor of a railroad company in receivership leave to intervene for the purpose of asking discharge of receivers and termination of the receivership, if it appears that such intervention would delay or prejudice the adjudication of the rights of the original parties.

RULE 26—Depositions Pending Action—Subdivision (a)—When Depositions May Be Taken

Ethel Varey v. Paul Gaunt. (Southern District of New York, HULBERT, D. J., April 17, 1939).

A party who has moved for a bill of particulars and who is subsequently served by his adversary with notice to take depositions may be entitled to a bill of particulars as to some of the items before the taking of the depositions and the service of a further bill as to the others may be postponed till after such time.

Maybelle Watson Bergmann v. Joe Morris Music Co., et al. (Southern District of New York, LEIBELL, D. J., May 23, 1939).

Although the new rules are not applicable to proceedings in copyright until made so by the Supreme Court, if a claim for copyright infringement is joined with a claim for accounting under a contract, the new Rules, including those relating to discovery, are applicable to the latter claim.

RULE 30—Depositions Upon Oral Examination—Subdivision (a)—Notice of Examination: Time and Place

Alexander Nekrasoff v. U. S. Rubber Company, et al. Gregory Bashkirov v. U. S. Rubber Company, et al. (Southern District of New York, HULBERT, D. J., April 20, 1939).

A party may simultaneously examine his adversary before trial and require him to respond to a request for admission concerning the same matters.

Subdivision (d)—Motion to Terminate or Limit Examination

Alexander Nekrasoff v. U. S. Rubber Company, et al. Gregory Bashkirov v. U. S. Rubber Company, et al. (Southern District of New York, HULBERT, D. J., April 20, 1939).

That the giving of the testimony sought by notice to take depositions will require disclosure of secret processes is not a ground for vacating the notice. Such objection may be presented at proper time by motion to terminate or limit the examination.

RULE 33—Interrogatories to Parties

Jacob Teller, et al. v. *Montyomery Ward & Co., Incorporated.* (Eastern District of Pennsylvania, KALODNER, D. J., Apr. 21, 1939).

1. Defendant in a patent suit should not be required to answer an interrogatory which calls for a construction of the patent claim and for an admission or denial of infringement as a legal conclusion.

2. In a patent suit defendant may be required to answer interrogatory requesting names and addresses of manufacturers of alleged infringing articles, but only on condition that plaintiffs furnish a list of their licensees.

William J. O'Rourke v. RKO Radio Pictures, Inc. (District of Massachusetts, SWEENEY, D. J., May 19, 1939).

1. Interrogatories concerning matters admitted by the pleadings should not be allowed.

2. In an action for plagiarism plaintiff is entitled to propound interrogatories as to whether the defendant's agent read the plaintiff's work, which the defendant is charged with copying.

3. Interrogatories as to the contents of a communication should not be allowed since adequate means exist for the production of the communication and opportunity to copy it. (Rule 34).

4. In a non-jury action interrogatories addressed to the amount of damages are premature prior to the determination of liability.

RULE 34—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Peter M. Murphy v. *New York & Porto Rico Steamship Company.* (Southern District of New York, HULBERT, D. J., Apr. 13, 1939).

In an action by a seaman for personal injuries, defendant ship owner was ordered to allow plaintiff to inspect and make copies of any reports made in the regular course of business with reference to plaintiff's injuries. Counsel for defendant advised plaintiff that defendant had no records pertaining to the injury, and that the vessel's log book made no mention of the event. Plaintiff moved to strike a portion of the answer for failure to comply with the order. *Held,* that plaintiff should be permitted to inspect the log book, failing which, the motion should be granted.

Marie Antoinette Giraudo Monks v. *Donald J. Hurley, et al.* (District of Massachusetts, MCLELLAN, D. J., May 8, 1939).

On motion for production of documents counsel for opposing party may be directed to obtain the documents from his client and make them available for copying or photographing by the moving party.

Jacob Teller, et al. v. *Montgomery Ward & Co., Incorporated.* (Eastern District of Pennsylvania, KALODNER, D. J., Apr. 24, 1939).

Production of records and articles for inspection should, technically, be sought under Rule 34 but if such discovery has been attempted by a motion for a bill of particulars no useful purpose is served by denying it.

Joseph Rosenblum v. Carl I. Dingfelder, et al. (Southern District of New York, MANDELBAUM, D. J., April 7, 1939).

The order directing production of documents should specify the time, place and manner of making inspection and copies thereof.

Oskar Piest v. Tide Water Oil Company, et al. (Southern District of New York, HULBERT, D. J., April 28, 1939).

A party should not be required to produce correspondence between its unnamed subsidiaries and its adversary.

William J. O'Rourke v. RKO Radio Pictures, Inc. (District of Massachusetts, SWEENEY, D. J., May 19, 1939).

Interrogatories as to the contents of a communication should not be allowed since adequate means exist for the production of the communication and opportunity to copy it.

RULE 36—Admission of Facts and of Genuineness of Documents—Subdivision (a)—Request for Admission

Alexander Nekrasoff v. U. S. Rubber Company, et al. Gregory Bashkirov v. U. S. Rubber Company, et al. (Southern District of New York, HULBERT, D. J., Apr. 20, 1939).

1. Rule 36 relates to the admission of facts as well as the genuineness of documents.

2. The court may not entertain a motion to vacate, modify or limit a request for admission of facts and genuineness of documents.

3. A party may simultaneously examine his adversary before trial and require him to respond to a request for admission concerning the same matters. (Rule 30 (a))

4. That the giving of the testimony sought by notice to take depositions will require disclosure of secret processes is not a ground for vacating the notice. Such objection may be presented at proper time by motion to terminate or limit the examination. (Rule 30 (d))

RULE 37—Refusal to Make Discovery: Consequences—Subdivision (b)—Failure to Comply with Order—Paragraph (2) (iii)—Other Consequences

Peter M. Murphy v. *New York & Porto Rico Steamship Company.* (Southern District of New York, HULBERT, D. J., Apr. 13, 1939).

In an action by a seaman for personal injuries defendant ship owner was ordered to allow plaintiff to inspect and make copies of any reports made in the regular course of business with reference to plaintiff's injuries. Counsel for defendant advised plaintiff that defendant had no records pertaining to the injury, and that the vessel's log book made no mention of the event. Plaintiff moved to strike a portion of the answer for failure to comply with the order. *Held,* that plaintiff should be permitted to inspect the log book, failing which, the motion should be granted. (Rule 34.)

Subdivision (d)—Failure of Party to Attend or Serve Answers

Mark Cohn v. *John Annunziata.* (Southern District of New York, HULBERT, D. J., Apr. 8, 1939).

1. Upon the failure of a party to appear in compliance with a notice to take depositions, the court may order him to appear on a day certain or make proper proof of his physical inability to do so.

2. If a party wilfully fails to appear for examination before trial in compliance with order of the court, his pleading may be stricken out and his adversary permitted to proceed to judgment.

RULE 38—Jury Trial of Right—Subdivision (b)—Demand

Helen Gunther v. The H. W. Gossard Company. (Southern District of New York, LEIBELL, D. J., May 29, 1939).

If, in an action in which the defendant interposed a counterclaim arising out of the same transactions as the plaintiff's claim, the plaintiff files a demand for a jury trial in due time in respect to the counterclaim but which is too late in respect to the plaintiff's claim, the court in the exercise of discretion may order a jury trial of all the issues.

RULE 39—Trial by Jury or by the Court—Subdivision (b)—By the Court

Helen Gunther v. The H. W. Gossard Company. (Southern District of New York, LEIBELL, D. J., May 29, 1939).

If, in an action in which the defendant interposed a counterclaim arising out of the same transactions as the plaintiff's claim, the plaintiff files a demand for a jury trial in due time in respect to the counterclaim but which is too late in respect to the plaintiff's claim, the court in the exercise of discretion may order a jury trial of all the issues. (Rule 38 (b))

RULE 41—Dismissal of Actions—Subdivision (a)—Voluntary Dismissal: Effect Thereof—Paragraph (2)—By Order of Court

Samuel Bloomfield, et al. v. *Measuring Device Corporation, a corporation.* (Southern District of New York, HULBERT, D. J., Apr. 7, 1939).

Motion by plaintiff for leave to dismiss should not be granted *ex parte,* but should be heard on notice to adverse parties.

RULE 43—Evidence—Subdivision (c)—Record of Excluded Evidence

United States of America v. *Aluminum Company of America, et al.* (Southern District of New York, CAFFEY, D. J., May 17, 1939).

During the course of the trial, without a jury, in an action by the Government for the violation of antitrust laws, defendant's objection to a portion of the testimony of one of plaintiff's witnesses was sustained on the ground of incompetency in that no sufficient foundation for it had been laid.

Counsel for plaintiff explained that the excluded evidence related to statements made by persons whom he expected the defendant to call as witnesses later in the trial; that the witness then on the stand resided at a great distance; that considerable expense would be involved in the event he were to be recalled.

Held, that the proffered evidence should be taken provisionally with full opportunity for cross-examination, and that if proper foundation were thereafter laid it might then be admitted.

RULE 45—Subpoena—Subdivision (b)—For Production of Documentary Evidence

Maybelle Watson Bergmann v. Joe Morris Music Co., et al. (Southern District of New York, LEIBELL, D. J., May 23, 1939).

Although the new Rules are not applicable to proceedings in copyright until made so by the Supreme Court, if a claim for copyright infringement is joined with a claim for accounting under a contract, the new Rules, including those relating to discovery, are applicable to the latter claim.

RULE 52—Findings by the Court—Subdivision (a) Effect

Penmac Corporation v. *Esterbrook Steel Pen Mfg. Co.* (Southern District of New York, WOOLSEY, D. J., Mar. 31, 1939).

1. Findings of fact and conclusions of law in non-jury cases should not be a part of the opinion of the court but should be separately stated and numbered.

2. Findings should contain only essential facts and should not include evidence.

3. Counterfindings need not be submitted by the defeated party.

4. Procedure outlined for preparation and submission of findings of fact and conclusions of law.

[EDITOR'S NOTE: Patent infringement suit by the Penmac Corporation against the Esterbrook Steel Pen Manufacturing Company, based on five patents for mechanical operation of the lead in pencils and alleging infringement by the defendant.]

E. G. McKeever, et al. v. Rufus W. Fontenot. (Circuit Court of Appeals for the Fifth Circuit, HOLMES, C. J., June 6, 1939).

Findings of fact should not be set aside on appeal if the evidence in support thereof, aside from varying views of experts, although circumstantial and subject to interpretation, is without material conflict.

RULE 53—Masters—Subdivision (e)—Report—Paragraph (2)—In Non-Jury Actions

In the matter of Pullmatch, Incorporated, Debtor. (Southern District of Ohio, Western Division, NEVIN, D. J., May 10, 1939).

1. The rule that in actions tried before a master the court shall accept the master's findings of fact unless clearly erroneous, applied to the report of a master appointed in bankruptcy proceedings.

2. The rule as to the weight to be given to the report of a special master was not changed by the new Rules.

RULE 56—Summary Judgment—Subdivision (a)—For Claimant

Kathryn Hebard Larson v. J. C. Holten. (District of Minnesota, Third Division, SULLIVAN, D. J., Apr. 4, 1939).

In an action on a judgment, motion for summary judgment granted reserving for the trial the determination of amount due.

Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corporation, et al. and Harold Wilkinson v. Compania Mexicana De Petroleo "El Aguila," S. A. (Southern District of New York, LEIBELL, D. J., Apr. 13, 1939).

Plaintiff may move for a summary judgment dismissing the counterclaim of a third-party defendant, if the latter is not entitled to recover on the counterclaim.

RULE 59—New Trials—Subdivision (a)—Grounds

United States of America v. 3,376.1 *Acres of Land, et al.* (Eastern District of Kentucky, FORD, D. J., May 5, 1939).

After the trial and while the case is under submission, motion for leave to file additional documentary evidence may not be entertained. The court may, however, reopen the case for the introduction of additional proof.

RULE 73—Appeal to a Circuit Court of Appeals—Subdivision (a)—How Taken

C. H. Crump, Trustee v. *Mrs. Ivy G. Hill.* (Circuit Court of Appeals for the Fifth Circuit, HUTCHESON, C. J., May 24, 1939).

The timely filing of a waiver of service of notice of appeal and the entry of an appearance to an appeal, together with a designation of the record on appeal by both parties, is sufficient to give the appellate court jurisdiction of the appeal, although no notice of appeal was actually filed in time.

RULE 77—District Courts and Clerks—Subdivision (b)—Trials and Hearings; Orders in Chambers

United States of America v. 3,376.1 *Acres of Land, et al.* (Eastern District of Kentucky, FORD, D. J., May 5, 1939).

After the trial and while the case is under submission, motion for leave to file additional documentary evidence may not be entertained. The court may, however, reopen the case for the introduction of additional proof. (Rule 59 (a).)

RULE 81—Applicability in General—Subdivision (a) (1)—To What Proceedings Applicable

Maybelle Watson Bergmann v. Joe Morris Music Co., et al. (Southern District of New York, LEIBELL, D. J., May 23, 1939).

Although the new Rules are not applicable to proceedings in copyright until made so by the Supreme

(*Continued on page* 616)

REVIEW OF RECENT SUPREME COURT DECISIONS

Right to Assemble Peaceably in Streets and Public Parks of City for Discussion of Rights under National Labor Relations Act Cannot Be Denied by a State or Municipality on the Ground That Such Assembly May Provoke Disorder — Congress Has Controlling Power to Decide Whether an Amendment to the Constitution Has Been Ratified or Rejected—Transfer Tax on Intangible Property Held in Trust in One State but Passing under the Will of a Beneficiary Domiciled in Another State—Agricultural Marketing Agreements Act of 1937 and the Minimum Prices Which It Authorizes Are Valid Exercise of Congressional Power over Interstate Commerce—Inclusion in Corporate Tax Assessment of Intangible Personal Property the Evidences of Which Are Kept in Another State—Other Cases

By Edgar Bronson Tolman*

The Fourteenth Amendment—Freedom of Speech and the Right of Peaceable Assembly

The right of employees and other persons to assemble peaceably in the streets and public parks of a city for the discussion of their rights under the National Labor Relations Act, and to distribute printed matter relevant to the discussion of their rights under that or any law of the United States cannot be denied by a State or municipality on the ground that such an assembly may be provocative of riot and disorder.

Hague, individually, and as Mayor of Jersey City, et al, Petitioners, v. Committee for Industrial Organization, et al., 83 Adv. Op. 928; 59 Sup. Ct. Rep. 954.

At the last session of the court before the summer adjournment the decision of the Circuit Court of Appeals, Third Circuit, was modified and as modified affirmed by a vote of five to two.

Justices Frankfurter and Douglas not participating.

Justices McReynolds and Butler dissenting.

Two opinions were filed in support of the majority holding, one by Mr. Justice Roberts and one by Mr. Justice Stone. The disagreement was not as to the result but as to the course of reasoning by which it was reached.

Mr. Justice Black concurred in the Roberts opinion. Mr. Justice Reed concurred in the Stone opinion and the Chief Justice concurred in parts of each opinion.

The bill was filed in the United States District Court for the District of New Jersey by the Committee for Industrial Organization, by individual citizens members thereof, and by the American Civil Liberties Union, against the Mayor, other officers, and boards of Jersey City, New Jersey; to restrain the abridgment of the right of free speech and of peacable assembly.

The facts sufficiently appear from the findings of the district court which are summarized in Mr. Justice Roberts' opinion as follows:

"In brief, the court found that the purposes of respondents, other than the American Civil Liberties Union, were the organization of unorganized workers into labor unions, causing such unions to exercise the normal and legal functions of labor organizations, such as collective bargaining with respect to the betterment of wages, hours of work and other terms and conditions of employment, and that these purposes were lawful; that the petitioners, acting in their official capacities, have adopted and enforced the deliberate policy of excluding and removing from Jersey City the agents of the respondents; have interfered with their right of passage upon the streets and access to the parks of the city; that these ends have been accomplished by force and violence despite the fact that the persons affected were acting in an orderly and peaceful manner; that exclusion, removal, personal restraint and interference, by force and violence, is accomplished without authority of law and without promptly bringing the persons taken into custody before a judicial officer for hearing. . . .

"The court found that the rights of the respondents, and each of them, interfered with and frustrated by the petitioners, had a value, as to each respondent, in excess of $3,000, exclusive of interest and costs; that the petitioners' enforcement of their policy against the respondents caused the latter irreparable damage; that the respondents have been threatened with manifold and repeated persecution, and manifold and repeated invasions of their rights; and that they have done nothing to disentitle them to equitable relief.

"The court concluded that it had jurisdiction under Sec. 24 (1) (12) and (14) of the Judicial Code; that the petitioners' official policy and acts were in violation of the Fourteenth Amendment, and that the respondents had established a cause of action under the Constitution of the United States and under R. S. 1979, R. S. 1980, and R. S. 5508, as amended.

"The Circuit Court of Appeals concurred in the findings of fact; held the District Court had jurisdiction under Section 24 (1) and (14) of the Judicial Code; modified the decree in respect of one of its provisions, and, as modified, affirmed it."

In the Supreme Court the issues were limited by petitioners, first, to a challenge of jurisdiction of the district court, second, to the correctness of the decision that the street meeting ordinance was unconstitutional, third, that the decree exceeds the court's power and is impracticable of enforcement or compliance.

Mr. Justice Roberts, in support of the judgment of the court said:

"Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. Until 1875, save for the limited jurisdic-

*Assisted by James L. Homire and Leland Tolman.

tion conferred by the Civil Rights Acts, *infra*, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon United States courts has been narrowly limited.

"Section 24 of the Judicial Code confers original jurisdiction upon District Courts of the United States. Subsection (1) gives jurisdiction of 'suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000' and 'arises under the Constitution or laws of the United States.'

"The wrongs of which respondents complain are tortious invasions of alleged civil rights by persons acting under color of state authority. It is true that if the various plaintiffs had brought actions at law for the redress of such wrongs the amount necessary to jurisdiction under Section 24 (1) would have been determined by the sum claimed in good faith. But it does not follow that in a suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under subsection (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involves the necessary sum. The record here is bare of any showing of the value of the asserted rights to the respondents individually and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give jurisdiction. We conclude that the District Court lacked jurisdiction under Section 24 (1).

"Section 24 (14) grants jurisdiction of suits 'at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.'

"The petitioners insist that the right of which the respondents say they have been deprived are not within those described in subsection (14). The courts below have held that citizens of the United States possess such rights by virtue of their citizenship; that the Fourteenth Amendment secures these rights against invasion by a state, and authorizes legislation by Congress to enforce the Amendment."

MR. JUSTICE ROBERTS took up the legislative and constitutional history of the questions involved. He called attention to the fact that before the Civil War there was confusion and debate as to the relation between United States citizenship and State citizenship. He showed that after the adoption of the Thirteenth Amendment the first Civil Rights Act was passed primarily to secure to the recently freed negroes all the civil rights secured for white men. He emphasized the fact that this Act was confined in its operations to persons and that it gave to the district court jurisdiction of civil actions by persons deprived of rights secured to them by its terms. He showed also that the Fourteenth Amendment was introduced at the same session of Congress as the first Civil Rights Act. That its purpose was to quiet doubts as to the power of Congress over the subject matter and to prevent the repeal of that Act by a subsequent Congress. He showed that the amendment settled the old controversy as to citizenship and that thereafter "citizenship of the United States became primary and citizenship of a State secondary."

The opinion proceeded with an extended historical review of the Second and Third Civil Rights Acts, and the purpose and effect of that legislation which here must be passed over without comment.

Coming to the main point in controversy MR. JUSTICE ROBERTS said:

"The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgement by Section 1 of the Fourteenth Amendment; and whether R. S. 1979 and Section 24 (14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

"Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."

Reviewing the Slaughter House cases and United States v. Cruikshank, both of which sustained the rights of citizenship under discussion, it was declared that "no expression of a contrary view has ever been voiced by this court."

Continuing the discussion of the fundamental rights involved and the jurisdiction of the Federal Courts to vindicate those rights, it was said:

"The National Labor Relations Act declares the policy of the United States to be to remove obstructions to commerce by encouraging collective bargaining, protecting full freedom of association and self-organization of workers, and, through their representatives, negotiating as to conditions of employment.

"Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under Section 24 (14).

"Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

It has been claimed by the Mayor and officials of Jersey City that the ownership of the streets and public parks which was by law vested in the municipality, justified its power to limit the privilege of assembly therein only to those who should use it without danger of public disorder and that applications for use of the streets and public places therefore might be lawfully granted or denied as the facts might be found.

On this subject MR. JUSTICE ROBERTS said:

"What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute as one's ownership of his home, with

consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power.

"The findings of fact negative the latter assumption. In support of the former the petitioners rely upon *Davis* v. *Massachusetts*, 167 U. S. 43. There it appeared that, pursuant to enabling legislation, the city of Boston adopted an ordinance prohibiting anyone from speaking, discharging fire arms, selling goods, or maintaining any booth for public amusement on any of the public grounds of the city except under a permit from the Mayor. Davis spoke on Boston Common without a permit and without applying to the Mayor for one. He was charged with a violation of the ordinance and moved to quash the complaint, *inter alia*, on the ground that the ordinance abridged his privileges and immunities as a citizen of the United States and denied him due process of law because it was arbitrary and unreasonable. His contentions were overruled and he was convicted. The judgment was affirmed by the Supreme Court of Massachusetts and by this court."

Davis v. Massachusetts was examined and distinguished. It was found that the ordinance there in question had a different purpose from that of the one here challenged; that the New Jersey ordinance was plainly motivated by an intent to regulate the right of assembly and discussion. It was shown that wherever the title of streets and parks might rest, they had immemorially been held in trust for the use of the public and that while the privilege of a citizen of the United States to use the streets and parks for communication of views on National questions might be regulated in the interest of all, it "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." It was accordingly held that the ordinance was void upon its face because it did not make comfort or convenience the standard of official action but was so phrased that it might be used as an "instrument of arbitrary suppression of free expression of views on national affairs" by the Director of Safety.

As to the final point of controversy, namely the objections to the decree as unenforceable and impracticable, the Court said:

"Section A deals with liberty of the person and prohibits the petitioners from excluding or removing the respondents or persons acting with them from Jersey City, exercising personal restraint over them without warrant or confining them without lawful arrest and production of them for prompt judicial hearing, saving lawful search and seizure; or interfering with their free access to the streets, parks, or public places of the city. The argument is that this section of the decree is so vague in its terms as to be impractical of enforcement or obedience. We agree with the court below that the objection is not well founded.

"Section B deals with liberty of the mind. Paragraph 1 enjoins the petitioners from interfering with the right of the respondents, their agents and those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner. It reserves to the petitioners full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer. We think this paragraph unassailable.

"Paragraphs 2 and 3 enjoin interference with the distribution of circulars, handbills and placards. The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin, supra*, and petitioners so concede. We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.

"Paragraph 4 has to do with public meetings. Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There is an initial command that the petitioners shall not place 'any previous restraint' upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does."

The conclusion was accordingly reached that the bill should be dismissed as to all save the individual plaintiffs, that the decree should be modified as indicated and that in all other respects the decree should be affirmed.

MR. JUSTICE STONE'S opinion expounded the principles by which he reached the same ultimate conclusion as that reached by MR. JUSTICE ROBERTS, although by a different path. In the opening paragraph of his opinion he said:

"I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail. It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment . . . (citing many cases.) It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers, . . . and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined."

The opinion declared that the right to maintain a suit in equity to restrain state officers acting under a state law from infringing the rights of free speech and of assembly guaranteed by the due process clause, was given by Congress to every person within the jurisdiction of the United States whether a citizen or not, and that such a suit might be maintained in the district court without allegation of proof that the jurisdictional amount required by Section 24 (1) of the Judicial Code is involved. It was suggested that there was therefore no necessity for jurisdictional purposes or any other purpose to revive the old debate whether the right to maintain such an action grew out of the relationship of United States citizens to the National Government, and it was contended that the right must be limited to an enforcement of the privileges of citizens only. On this point MR. JUSTICE STONE said:

"No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, but which the privileges and immunities clause secures only to citizens, and then only to the limited extent that their relationship to the national government is affected. I am unable to rest decision here on the assertion, which I think the record fails to support, that respondents must depend upon their limited privileges as citizens of the United States in order to sustain their cause, or upon so palpable an avoidance of the real issue in the case, which respondents have raised by their plead-

ings and sustained by their proof. That issue is whether the present proceeding can be maintained under § 24 (14) of the Judicial Code as a suit for the protection of rights and privileges guaranteed by the due process clause. I think respondent's right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose.

"If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, inadequately supported by the record, in order to attain an end easily and certainly reached by following the beaten paths of constitutional decision."

Further support of the broader rights stated by MR. JUSTICE STONE was given by his review of the various Civil Rights acts, emphasis being laid upon the words quoted from Section 1 of the Civil Rights act of April 1871, "Any citizen of the United States or other person within the jurisdiction thereof," from which the deduction is made that the rights are "those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses." But MR. JUSTICE STONE does not differ from MR. JUSTICE ROBERTS in that part of the latter's opinion confining the right of action to individuals. On this point he says:

"As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons."

As to whether jurisdiction depended on proof of the amount involved, MR. JUSTICE STONE said:

"The question remains whether there was jurisdiction in the district court to entertain the suit although the matter in controversy cannot be shown to exceed $3,000 in value because the asserted rights, freedom of speech and freedom of assembly, are of such a nature as not to be susceptible of valuation in money. The question is the same whether the right or privilege asserted is secured by the privileges and immunities clause or any other."

The provisions of the Civil Rights Act of 1871 and of other acts were reviewed, the construction of the court in many cases is cited, and the final conclusion on this point is stated as follows:

"The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under § 24 (14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000. As the right is secured to 'any person' by the due process clause, and as the statute permits the suit to be brought by 'any person' as well as by a citizen, it is certain that resort to the privileges and immunities clause would not support the decree which we now sustain and would involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate."

MR. JUSTICE REED concurred in this opinion.

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"With respect to the merits I agree with the opinion of Mr. Justice Roberts and in the affirmance of the judgment as modified. With respect to the point as to jurisdiction I agree with what is said in the opinion of Mr. Justice Roberts as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of jurisdiction upon that ground. As to that matter, I concur in the opinion of Mr. Justice Stone.

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Twenty-one members of the Senate including the 20 senators who had voted against the resolution and three members of the House brought an original proceeding in mandamus in the Supreme Court of Kansas to compel the Secretary of the Senate to erase an endorsement on the resolution reciting that it had been adopted by the Senate and to restrain further official action thereon by the officers of the Senate and House and the Secretary of State and delivery thereof to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote. It also

set forth the prior rejection of the proposed amendment, alleged that the amendment had also been rejected by both houses of the Legislatures of twenty-six states, had been ratified in only five states and that by reason of that rejection and the failure of ratification within reasonable time, the proposed amendment had lost its vitality.

The Supreme Court of Kansas held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed amendment retained its original vitality, and that the act of ratification by the legislature of Kansas was final and complete. The Supreme Court of the United States granted certiorari.

The opinion of the court was delivered by the CHIEF JUSTICE. As to the jurisdiction of the court he held that since the state court had determined in substance that "members of the legislature had standing to seek and the court had jurisdiction to grant mandamus to compel a proper record of legislative action" and since the question raised "arose under the Federal Constitution," the questions presented were "conclusively federal questions and not state questions."

It had been contended that the petitioners lacked an adequate interest to invoke the jurisdiction of the Supreme Court to review the state court decisions. In rejecting this condition the CHIEF JUSTICE said:

"Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. As the validity of a state statute was not assailed, the remedy by appeal was not available (Jud. Code, Sec. 237 (a); 28 U. S. C. 344(a)) and the appropriate remedy was by writ of certiorari which we granted. Jud. Code, Sec. 237 (b); 28 U. S. C. 344(b)."

Prior decisions on this question of jurisdiction, *Leser v. Garnett* and *Hawke v. Smith*, and many other cases were reviewed and this branch of the controversy was closed with the following statement:

"In the light of this course of decisions, we find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision."

The opinion next takes up the question of the participation of the Lieutenant Governor and the contention that he was not a part of the "legislature" and therefore under Article V of the Federal Constitution could not be permitted to have a deciding vote on the ratification of the proposed Amendment. As to this point the CHIEF JUSTICE said:

"Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point."

The third point—the effect of the previous rejection of the amendment and of the lapse of time since its submission, presented two questions which were separately dealt with. On the first of these questions the CHIEF JUSTICE said:

"The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify. The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by 'Conventions' were prescribed by the Congress, a convention could not reject and, having adjourned *sine die*, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers, that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act 'but once, either by conventon or through its legislature.'"

Many historic instances were cited including the rejection and subsequent ratification of the Thirteenth Amendment in 1865 by the legislature of New Jersey. The rejection and subsequent ratification of the Fourteenth Amendment by the legislature of Georgia and the Carolinas in 1866 and 1868; The ratification of that amendment by Ohio and New Jersey and their later withdrawal of their ratification.

It was shown that the political department of the government dealt with the effect of these various instances of previous rejections and of attempted withdrawal and that the decision of the political department of the government as to the validity of the adoption of the Fourteenth Amendment had been accepted, and it was said:

"We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

"The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections."

The statutory provision in respect to constitutional amendments was set out and it was shown that the statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification and the court said: "We see no warrant for judicial interference with the performance of that duty."

On the question of the effect of delay the court said:

"The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a

limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view. It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937."

Reference was made to the decision of the court in *Dillon v. Gloss* where the action of Congress provided that the proposed Eighteenth Amendment should be inoperative unless ratified within seven years, and the Court held that Congress might fix a reasonable time for ratification. It was noted that no limitation of time for ratification was provided in the instant case. Petitioners however contended that the court might and should decide what is a reasonable period within which ratification might be had.

Attention was called to the fact that what was said in *Dillon v. Gloss* was directed to the proposition that Congress had the power to fix a reasonable time for ratification but it was said that it did not follow that where Congress had not exercised that power, the court should exercise it. On this point the CHIEF JUSTICE said:

"Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that 'the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration.' That statement is pertinent, but there are additional matters to be examined and weighed. . . . In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

"Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemd that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts."

The opinion proceeds to discuss many illustrations of questions of policy which involved "considerations of extreme magnitude and certainly entirely incompetent to the examination and decision of a court of justice," but which had been declared as appropriately falling within the category of political and non-justiciable questions, and the opinion closes with the following statement:

"For the reasons we have stated, which we think to be as compelling as those which underlay the cited decisions, we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

"As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion."

Concurring opinion by MR. JUSTICE BLACK in which MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS joined.

The scope of this opinion is indicated by its opening paragraphs:

"Although, for reasons to be stated by Mr. Justice Frankfurter, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling, Mr. Justice Roberts, Mr. Justice Frankfurter, Mr. Justice Douglas and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

"The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place 'is conclusive upon the courts.' In the exercise of that power Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a 'political department' of questions of a type which this Court has frequently designated 'political.' And decision of a 'political question' by the 'political department' to which the Constitution has committed it 'conclusively binds the judges, as well as all other officers, citizens and subjects of . . . government.' Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree."

After an elaboration of the foregoing and a review of *Dillon v. Gloss* this opinion concluded as follows:

"Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgement of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority."

Opinion by MR. JUSTICE FRANKFURTER in which MR. JUSTICE ROBERTS, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS joined.

It will be remembered that the decision of the Supreme Court of Kansas in the instant case denied an application for mandamus to expunge the record of the ratification of the proposed Child Labor Amendment. The opinion of the CHIEF JUSTICE was that the judgment of the Supreme Court of Kansas dismissing the petition should be affirmed. This opinion comes to the conclusion that the petition for certiorari should be dismissed for lack of jurisdiction. The four Justices above named held the view that the petitioners had no standing in the Supreme Court. The opening paragraphs of the opinion sufficiently expresses that view:

"In endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending 'judicial Power' only to 'Cases' and 'Controversies.' Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.' It was not for courts to meddle with matters that required no subtlety to be identified as political issues. And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass up them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law . . .

"As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are not mechanical criteria but derive from conceptions regarding the distribution of governmental powers in their manifold, changing guises, differences in the application of canons of jurisdiction have arisen from the beginning of the Court's history. Conscious or unconscious leanings toward the serviceability of the judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions. For they influence awareness in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them."

Denying the right of petitioners for a review of the action of the Kansas court the opinion declared:

"It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency. . . . Unlike the rôle allowed to judges in a few state courts and to the Supreme Court of Canada, our exclusive business is litigation. The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined. No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all.

"In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens? The answer requires analysis of the grievances which they urge."

This analysis takes up salient features of the controversy, the claim that for Kansas there was no Child Labor Amendment to ratify because not ratified within a "reasonable time" and next that even if the amendment was alive the prior resolution of rejection by Kansas had exhausted her power.

Reviewing many cases which were considered by the court to be conclusive denials of right of the Federal courts to review political questions, the opinion declared:

"We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names. Therefore, none of the petitioners can here raise questions concerning the power of the Kansas legislature to ratify the Amendment."

The right of the Kansas senators to apply for review was also examined under the authority of *Leser v. Garnett*, on which that right had been supported. That case was interpreted as declaring the right of a voter to protect his franchise. The historic source of that doctrine and the reasons for it were reviewed and the case distinguished. The English case of *Ashby v. White* which dealt with judicial power to review inter-parliamentary controversies was considered and the opinion concluded with the following paragraphs:

"The reasoning of *Ashby* v. *White* and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if 'political' has any connotation at all. . . . In no sense are they matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. If the doctrine of *Ashby* v. *White* vindicating the private rights of a voting citizen has not been doubted for over two hundred years, it is equally significant that for over two hundred years *Ashby* v. *White* has not been sought to be put to purposes like the present. In seeking redress here these Kansas senators have wholly misconceived the functions of this Court. The writ of *certiorari* to the Kansas Supreme Court should therefore be dismissed."

The dissenting opinion of MR. JUSTICE BUTLER in which MR. JUSTICE REYNOLDS joined.

This opinion invokes the decision in *Dillon v. Gloss* as a definite holding that Article V requires amendments to be ratified within a reasonable time after proposal. It quotes from that opinion and declares:

"Upon the reasoning of our opinion in that case, I would hold that more than a reasonable time had elapsed and that the judgment of the Kansas supreme court should be reversed.

"The point, that the question—whether more than a reasonable time had elapsed—is not justiciable but one for Congress after attempted ratification by the requisite number of States, was not raised by the parties or by the

United States appearing as *amicus curiae;* it was not suggested by us when ordering reargument. As the Court, in the *Dillon* case, did directly decide upon the reasonableness of the seven years fixed by the Congress, it ought not now, without hearing argument upon the point, hold itself to lack power to decide whether more than 13 years between proposal by Congress and attempted ratification by Kansas is reasonable."

The case was argued by Mr. Rolla W. Coleman and Mr. Robert Stone for petitioners, Mr. Clarence V. Beck for respondents, and by Mr. Solicitor General Jackson for the United States as amicus curiae.

With *Coleman v. Miller* was also decided the companion case of *Chandler v. Wise,* in which a resolution of the Legislature of Kentucky purporting to ratify the Child Labor Amendment came before the court. Citizens, taxpayers and voters in Kentucky brought suit to restrain the Kentucky Governor from certifying the passage of the resolution to the Secretary of State of the United States and to the presiding officers of the United States Senate and House of Representatives. The basis of attack upon the validity of the ratification by Kentucky of the Child Labor Amendment was the fact that eleven years before, the amendment had been rejected by the General Assembly of the Commonwealth of Kentucky and also by more than a majority of the legislatures of the States. A restraining order had been granted by the Kentucky Court. In the meantime the Governor had certified the resolution to the Secretary of State but without knowledge of the pendency of the proceedings. An amended petition was filed in the Kentucky Court setting out the action taken by the Governor and seeking a mandatory injunction to require him to notify the Secretary of State of the pendency of the suit and that his action should be disregarded.

Defendants filed a general demurrer which was sustained by the Circuit Court but its judgment was reversed by the Kentucky Court of Appeals. After remandment the State Court held (1) that an actual controversy existed and that the court had jurisdiction to determine it, (2) that the legislative resolution of ratification was void, (3) that the notice given by the Governor to the Secretary of State was of no effect, and (4) that the Clerk of the Court should give official notice to the Department of State that the resolution purporting to ratify the amendment was invalid. On appeal that judgment was affirmed by the Court of Appeals and certiorari was granted by the Supreme Court of the United States.

The opinion of the court was announced by the CHIEF JUSTICE and after a summary of the record and the questions involved, the opinion concluded as follows:

"We think that, while the state court had jurisdiction *in limine,* the writ of certiorari should be dismissed upon the ground that after the Governor of Kentucky had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination."

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented and thought that the judgment of the Court of Appeals of Kentucky should be affirmed on the authority of *Dillon v. Gloss* and for the reasons stated in their dissenting opinion in *Coleman v. Miller, supra.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concurred in the judgment of dismissal, saying:

"For the reasons stated in concurring opinion in *Coleman* v. *Miller,* we do not believe that State or Federal courts have any jurisdiction to interfere with the amending process."

Taxation—Transfer Tax on Intangible Property Held in Trust—Double Taxation

An irrevocable trust of stocks and bonds of corporations was created by a settlor domiciled in Tennessee by conveyance of the securities to a trustee in Alabama, with power reserved to dispose of the corpus of the trust by will. The settlor subsequently died domiciled in Tennessee, leaving a will disposing of the trust corpus. In proceedings to tax the transfer of the corpus, both Alabama and Tennessee are permitted to tax the same notwithstanding the provisions of the due process clause of the Fourteenth Amendment. Legal relationships subject to the laws of both States were created by the trust and will, and it cannot be said that the intangibles are so localized in either State as to preclude the imposition of a transfer tax by either State, by reason of the due process clause.

Curry v. McCanless, 83 Adv. Op. 865; 59 Sup. Ct. Rep. 900.

The questions in this case were whether Alabama and Tennessee may each tax the transfer, at death, of intangible property held in trust in Alabama, but passing under the will of a beneficiary domiciled in Tennessee; and, if only one state may tax, which one?

Here the decedent, a domiciled resident of Tennessee, in 1917, executed a trust to an Alabama trust company covering stocks and bonds of Alabama corporations, which she had inherited under the will of her brother. She reserved no power of revocation, but reserved a power to require the sale of corpus if income were insufficient for her needs, and power to dispose of the corpus by will, the right to direct investments, and authority to remove the trustee and appoint a successor, as well as certain other powers.

In 1926, the decedent exercised the power to dispose of the corpus by will.

Both Alabama and Tennessee asserted the right to impose a death tax on the transfer of the intangibles held in trust. Litigation in Tennessee for a declaratory judgment finally resulted in a decree there that the trust property was taxable in Tennessee, but not in Alabama. The Alabama tax authorities appealed to the Supreme Court where the decree was reversed by a divided bench, in an opinion by MR. JUSTICE STONE.

He points out that the doctrine that the Fourteenth Amendment precludes taxation of an interest in the same intangible in more than one state is of recent origin and of limited extent, and has never been pressed to the extreme here urged.

He observes that the states are said to be without jurisdiction or without constitutional power to tax tangibles "if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax."

However, in the case of intangibles, other considerations control. Exposition of these is then made:

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection

afforded to those persons whose relationships are the origin of the rights . . . Obviously, as sources of actual or potention wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.

"The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.' . . . But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

MR. JUSTICE STONE then points out that where an owner *confines his activity to the state of domicile,* the rule of *mobilia sequuntur personam* and the theory of situs at domicile apply. But where the owner's activities extend to another state, the rule is not workable. As to this, the opinion states:

"But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland* . . . through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. . . But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."

The opinion then emphasizes that two sets of legal relationships were created here and that in effecting her purposes, the decedent brought some of the legal interests which she created within the control of one state by selecting a trustee there, and others within the control of the state of her domicile, making it difficult to see that one state is better entitled to tax than the other. In this connection, the opinion adds:

"It has hitherto been the accepted law of this Court that the state of domicile may constitutionally tax the exercise or non-exercise at death of a general power of appointment, by one who is both donor and donee of the power, relating to securities held in trust in another state. . . If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence 'jurisdiction to tax', and this is the reason underlying the maxim *mobilia sequuntur personam,* it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testratrix, Tennessee. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

"We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. . . That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. . . The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states. We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here.

"If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts."

MR. JUSTICE REED concurred except as to the statement that "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." Upon that point he reserved his conclusion.

MR. JUSTICE BUTLER delivered a dissenting opinion in which MR. CHIEF JUSTICE HUGHES, MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS joined.

Pressing the view that the Fourteenth Amendment, as heretofore construed, precludes the imposition of two inheritance taxes, he concludes that Tennessee was without power to levy such a tax on the intangibles held by the Alabama trustee. He urged that the trust property had no situs in Alabama, and that intangibles like tangibles may be so held and used outside the state of domicile of the owner as to become taxable where kept.

Arguing that the concept "business situs" is broad enough to cover the intangibles here, he said:

"Intangibles, like tangibles, may be so held and used outside the State of the domicile of the owner as to become taxable in the State where kept . . . The general rule of *mobilia sequuntur personam* must yield to the established fact of legal ownership, actual presence and control in a State other than that of the domicile of the owner. The phrase 'business situs' as used to support jurisdiction of a State other than that of the domicile of the owner to impose taxes on intangible personal property is a metaphorical expression of vague signification; its meaning is not limited to investment or actual use as an integral part of a business or activity, but may extend to the execution of trusts such as those created by the indenture and imposed on the trustee in this case."

The case was argued by Mr. Ray Rushton, Mr. Charles C. Trabue, Jr., and Mr. Marion Rushton for appellants and by Mr. Edwin F. Hunt for appellees.

In *Graves et al. v. Elliott et al.*, 83 Adv. Op. 880; 59 Sup. Ct. Rep. 913, a similar question was presented. There the question was whether New York may constitutionally tax the relinquishment at death, by a domiciled resident of that State, of a power to revoke a trust of intangibles held by a Colorado trustee.

The decedent in 1924, when a resident of Colorado, transferred bonds to a bank in Denver as trustee, the income to be paid to the decedent's daughter for life and to her children until each had reached a certain age, when the corpus was to be paid to the children. In default of such children, the corpus was to revert to the decedent and pass under her will. She reserved the right to remove the trustee, change any beneficiary, and to revoke the trust and revest title in herself. The decedent later became domiciled in New York where she died, without appointing new beneficiaries or revoking the trust.

The New York courts held that the intangibles were trust property not subject to the New York transfer tax under the limitations contained in the due process clause of the Fourteenth Amendment.

On certiorari, the decree below was reversed by the Supreme Court in an opinion by MR. JUSTICE STONE, who, relying upon the reasons stated in *Curry v. McCanless*, No. 339, decided the same day, says:

"For reasons stated in our opinion in *Curry* v. *McCanless, supra,* we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death . . ."

MR. CHIEF JUSTICE HUGHES dissented. In an opinion setting forth his views, he observes that while the Constitution contains no specific provision against double taxation, the rulings under the Fourteenth Amendment have established the principle that property must be attributable to a state to sustain jurisdiction to tax it. Land is cited as the most familiar example of this. It is noted also that the same theory has been extended to personalty having an actual situs in a state other than that in which the owner is domiciled. The rule, *mobilia sequuntur personam,* has been relaxed at least to that extent. The fact that the relaxation of the rule in such cases has been developed as to tangible personal property by invoking the notion of a "situs" is said not to justify the conclusion that intangibles cannot be also effectively localized in a state other than the owner's domicile. And the circumstances of the instant case were thought to demonstrate localization of the intangibles in Colorado. In developing his argument in support of this view, MR. CHIEF JUSTICE HUGHES states:

"In the instant case, the legal title to the property in question is in the Colorado trustee, the trust was created under the Colorado law and its administration is subject to the control of Colorado. To say that these securities are not as effectively localized in Colorado, as were the furniture, pictures and other art treasures of Mr. Frick in New York and Massachusetts, where alone their transfer could be taxed, would be to ignore realities and to make important rights turn upon a verbal distinction.

"Upon what ground then is it maintained that these securities are within the taxing power of New York? Solely, it appears, upon the ground that the indenture creating the trust in Colorado reserved to the settlor a power of revocation. This unexercised power is treated as carried by the settlor into New York and hence as bringing in its train the entire corpus of the trust property. That results, as already noted, in giving the fiction an oppressive operation. But, aside from that practical aspect, if through the trust in Colorado the securities have been effectively localized in that State, why should an unexercised power of revocation alter their status? Mr. Frick did not even need to revoke an instrument, for at any time he could have removed his furniture and art treasures from New York and Massachusetts to his domicile in Pennsylvania. But that obvious control, while unexercised, did not detract from the taxing power of the States where the property was, or permit taxation by the domiciliary State.

"It is said that the power of disposition is equivalent to ownership, and that its relinquishment at death is an appropriate subject of taxation. The case of federal taxation is not analogous as there are no state boundaries to be considered when the federal tax is laid. Nor are state cases relevant when there is no attempted extraterritorial application of a state statute, and it is not necessary again to review the authorities cited in the dissenting opinion in *Curry* v. *McCanless,* decided this day. For the present purpose it is sufficient to note that under the principle established in *Frick* v. *Pennsylvania* [268 U. S. 473], it is not enough to say that a power of disposition is equivalent to ownership, for ownership by a resident of a State gives that State no authority to tax property not attributable to its domains. Mr. Frick owned his property in New York and Massachusetts but still his own State of Pennsylvania could not tax its transfer.

"The fundamental question is thus not one of a reserved but unexercised power of revocation or of an ultimate control in an owner, but whether securities, classed as intangibles, are necessarily and in all circumstances subject to a different rule from that obtaining in the case of tangible personal property. It is not perceived that there is a sound basis for such an invariable distinction,

which is foreign to common thought and practical needs. When confronted with the question as to tangible personal property, we did not hesitate to limit the application of the fiction, and it is regrettable that we can not deal with the fiction in a similar fashion in such a case as this, where we have an effective localization of securities through a trust created in a State other than that of the settlor's domicile at the time of death, and where in that other State the trustee holds title and possession and has been and is administering the trust subject to its laws."

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS concurred in the dissenting opinion.

The case was argued by Mr. Mortimer M. Kassell for the petitioners, and by Mr. Frederick C. Bangs for the respondents.

Taxation—The Validity of Tax on Corporation by State of Incorporation—Assessment on Intangible Property in Another State

In imposing a tax on a corporation, the state wherein the corporation is domiciled may, consistently with the due process clause of the Fourteenth Amendment, include in the assessment intangible personal property, the evidences of which are kept in another state, at least where there is no adequate showing that the intangibles have acquired a situs in the other state.

Newark Fire Ins. Co. v. State Board of Tax Appeals, 83 Adv. Op. 889; 59 Sup. Ct. Rep. 918.

This case involved a question as to the jurisdiction of New Jersey to tax the appellant insurance company on the full amounts of its capital stock paid in and accumulated surplus. Chapter 236 of the Laws of 1918 is a general act for the assessment and collection of taxes. Section 202 thereof subjects all real and personal property in the State to an annual tax at its true value. Section 301 lays a tax on other than tangible personal property and is assessed on each inhabitant in the district of his residence. Section 305 concerns domestic corporations as residents of the district in which their chief office is located and renders their personal property taxable in the same manner as individuals except as otherwise provided. Section 307 provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situated, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

In the record it appeared that the appellant is a stock fire insurance corporation organized under New Jersey laws, which at the time of the assessment required it to locate its principal office and conduct its business in the State. The company maintained a registered office in Newark, N. J., together with such books as were required by law to be kept within the State. The only business carried on there was a local claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The executives and their offices are located in New York City where the general accounts are kept. The general accounting and underwriting offices are also located in New York. The cash, except a small sum, and securities are located in New York or in banks outside of New Jersey. All general affairs of the company have been conducted at the New York offices continuously since the company moved from New Jersey some six years prior to the assessment. No personal property tax is paid in New York, but the company does pay there a franchise tax based upon premiums.

The Board of Assessment of Newark as of October 1, 1934, made an assessment upon the capital stock paid in and accumulated surplus with deductions for debts and exemptions allowed by law. The appropriate local board sustained the assessment and the action was affirmed by the court of last resort of the State. The company resisted the assessment on the ground that the company's intangibles had acquired a business situs, and the corporation had acquired a tax domicile, in New York so that New Jersey had no jurisdiction to tax.

The Courts of New Jersey proceeded upon the theory that the tax is a property tax, but concluded that the State of the corporation's domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state. In view of this reasoning the appellant contended that the exaction was in violation of the due process clause of the Fourteenth Amendment.

On appeal, the Supreme Court found it unnecessary to determine whether the tax is a property tax or not. It proceeded upon the theory that New Jersey as the creator of the corporation has complete control over it. It further observed that there was no ground for making an exception to the general rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personal property. Delivering the opinion of the Court, MR. JUSTICE REED says:

"When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete. In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty, the presumption is that such property is taxable by the state of the corporation's origin. This power of New Jersey to tax is made effective by section 307 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type, as the franchise tax, at one time levied, was repealed by the Act of April 8, 1903."

The opinion then recognizes that the intangible personalty of an owner may become so inextricably a part of the business carried on in another state that it becomes subject to taxation by the other state. In view of this the appellant contended that the Court should decide that both states have not the power to tax the same property for the same incidents. But the Court found it unnecessary to answer this question, since the facts of record failed to overcome the presumption of domiciliary location. Proof of a business situs must definitely connect the intangibles as part of the local activity.

THE CHIEF JUSTICE, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS concurred with MR. JUSTICE REED.

MR. JUSTICE FRANKFURTER announced a separate opinion in which MR. JUSTICE STONE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concurred. In this opinion, it was urged that the present record did not call for a consideration of questions affecting "situs" of intangibles. MR. JUSTICE FRANKFURTER'S opinion is as follows:

"Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The ad-

justment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

"Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, affirming 41 N. Dak. 330. During all the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval. Questions affecting the fictional 'situs' of intangibles, which received full consideration in *Curry* v. *McCanless*, decided this day, do not concern the present controversies. *Cream of Wheat Co.* v. *Grand Forks*, *supra*, and the cases that have followed it, afford a wholly adequate basis for affirming the judgments below."

The case was argued by Mr. Arthur T. Vanderbilt for the appellant, and by Mr. Donald R. Richberg for the appellee.

Agricultural Marketing Agreements Act of 1937—Milk Control—Due Process of Law—Interstate Commerce

The agricultural marketing agreements act of 1937 and the minimum prices for milk which it authorizes are a valid exercise of the Congressional power over Interstate Commerce and the act does not unconstitutionally delegate legislative power.

The minimum prices fixed under the act by the Secretary of Agriculture for milk purchased from producers by handlers in the New York metropolitan area and in the greater Boston, Massachusetts, area do not violate the due process clause of the Constitution.

The challeneged provisions of the order of the Secretary of Agriculture relating to the marketing of milk in the New York metropolitan area are authorized by the Agricultural Marketing Agreements Act, and the order was validly adopted pursuant to its provisions.

The Amended Order of the Secretary of Agriculture relating to the marketing of milk in the greater Boston, Massachusetts, metropolitan area was adopted in accordance with the requirements of the Agricultural Marketing Agreements Act and is valid.

United States v. *Rock Royal Co-operative, Inc., et al; Holton V. Noyes* v. *Same; Dairymen's League Co-operative Assn.*, v. *Same; Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.*, v. *Same*. 83 Adv. Op. 981; 59 Sup. Ct. Rep. 993.

These appeals involved questions as to the validity of Order No. 27 of the Secretary of Agriculture regulating the handling of milk in the New York metropolitan area, and the constitutionality of the Agricultural Marketing Agreement Act of 1937, by authority of which the order was issued.

Actions were brought in the District Court for mandatory injunctions to compel three milk cooperatives, and one proprietary dairy company to comply with the provisions of the Secretary's order which dealt with milk moving in interstate commerce and with an order in pari materia of the Commission of Agriculture and Markets of the State of New York relating to milk in intrastate commerce. The New York State Commissioner of Agriculture and Markets was permitted to intervene as a party plaintiff to seek compliance with the state order, if it should be held applicable or, if not, to compel compliance with the Federal order.

In their answers, the defendants pleaded as affirmative defenses, that the secretary's order was invalid, because of erroneous representations by officials and private organizations made to bring about its adoption, and because of conspiracy on the part of certain private organizations to create a monopoly by it. The district court permitted the Dairymen's League Cooperative Association, referred to in the opinion as the league, and the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., referred to in the opinion as the agency, both of which had been active in securing adoption of the order to intervene to combat these defenses.

The answer also contained allegations that the orders were unconstitutional on various grounds, and one of the defendant cooperatives denied that it was subject to either order. In dismissing the complaints after hearing on the merits, the district court found that the state order need not be considered since the milk of all four defendants was covered by the Federal order, if it was valid; that sections 8c (5) Bii and 8c (5) (F) of the Act violated the due process clause of the Fifth Amendment; that the order was discriminatory and took property without compensation; that approval of the producers was secured by unlawful misrepresentation and coercion and that the provisions of the order which authorized payments to cooperative and proprietary handlers had no basis in the act.

The appeals came directly to the Supreme Court and were allowed by it because of the district court finding that certain sections of the act were unconstitutional.

MR. JUSTICE REED delivered the opinion of the majority of the Court. After stating the history of the litigation, he summarized the statute in so far as it relates to the order in question, pointing out that it is a reenactment and amendment of certain provisions of the Agricultural Adjustment Act of 1933, and that it aimed at assisting in the marketing of agricultural commodities. The Act declares that disruption of exchange of commodities in interstate commerce impairs the purchasing power of farmers, destroying the value of agricultural assets to the detriment of the national public interest and thus burdening and obstructing normal channels of interstate commerce. It declares the policy of Congress to maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period, August 1909 to July 1914, or, where that period cannot be satisfactorily determined, the period from August 1919 to July 1929, or a portion thereof. In prescribing minimum prices for milk, the Secretary is authorized to ignore the purchasing power during the base period to the extent necessary to reflect prices of available supplies of feed and other economic conditions, if he finds after hearing that the minimum prices based on base period purchasing power are unreasonable.

Section 8a (6) of the Act confers jurisdiction on the

district courts to enforce orders, regulations, or agreements under its provisions; section 8b authorizes voluntary marketing agreements between the Secretary and all producers and handlers of agricultural commodities in interstate commerce. Section 8c authorizes the issuance of orders as substitutes for agreements for the marketing of certain specified commodities including milk These can be made only when the Secretary believes that such an order will effectuate the policy of the act and after notice and opportunity for hearing. The order must set forth a finding upon the evidence that the issuance and terms of the order will tend to effectuate this policy, and, when the commodity is milk, it must contain certain terms and no others. The order can be issued only after hearings upon a marketing agreement of a similar character, and becomes effective without the approval of handlers only if there is a special determination of the Secretary, approved by the President, and after a referendum of the producers of the commodity which the secretary determines shows approval by two-thirds of those engaged in the production for market of the commodity within the production area, or two-thirds of those engaged in production of the commodity for sale in the marketing area specified in the agreement or order. Approval or disapproval by a cooperative association may be considered as approval or disapproval by the producers who are its members, stockholders, or patrons.

The act further provides for administrative and court review of petitions of handlers objecting to provisions of the order or seeking modification or exemption from it.

The opinion then states the economic problem involved as follows:

"The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. In the milkshed and marketing area of metropolitan New York these problems are peculiarly acute. It is generally recognized that the chief cause for fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. The sale of milk in metropolitan New York is ringed around with requirements of the health departments to assure the purity of the supply. Only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk. More than sixty thousand dairies located in the states of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania and Vermont hold certificates of inspection and approval from the Department of Health of the City of New York. More than five hundred receiving plants similarly scattered have been approved for the receiving and shipping of grades A and B milk. Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act."

The provisions of Order No. 27 and of the history of its adoption are then reviewed. The secretary had found that two-thirds of the milk produced in the New York marketing area actually moved in interstate commerce; that the remaining one-third was physically and inextricably intermingled with the interstate milk, that all was handled either in or so as to affect, burden, and obstruct interstate commerce in milk and its products. An exception was made for milk regulated by the order of the Commissioner of Agriculture and Markets of New York State. He also found that prices calculated in accordance with the base period purchasing power equivalent were not reasonable, and he fixed a minimum price to be determined from time to time by formula.

The order defines the marketing area as New York City and Nassau, Suffolk and Westchester counties, a producer as any person producing milk delivered to a handler at a plant approved by a health authority for receiving milk for sale in the marketing area, a handler as a person engaged in handling milk or cream received at an approved plant, including cooperative associations. It establishes minimum prices by a formula which varies with the butter-price range. Handlers must file reports of receipts and use of milk of various classes. The uniform price actually paid to the producer by the handler is computed by multiplying the amount of milk received by the handler by the minimum price. From the result certain reservations and payments are deducted and the remainder is divided by the total quantity of milk received. To equalize, handlers must pay into a producer settlement fund the amount by which their purchased milk, multiplied by the minimum price, is greater than their purchased milk multiplied by the uniform price. When the handlers milk multiplied by the minimum price is less than when it is multiplied by the uniform price, the producers settlement fund pays them the difference for distribution to their producers. In general, these provisions give uniform prices to all producers in accordance with the general use of milk for the preceding period.

The opinion then considers whether the suspension of the order by the Secretary pending the appeals, because of the effect of the district court decree upon its administration and enforcement had made the case moot. The Court concluded that it did not, since the suspension was authorized by the statute and the order of suspension had preserved accrued rights.

The contention that the order was adopted under circumstances which require a court of equity to refuse to enforce it because of widespread public misrepresentation amounting to fraud in its adoption is then considered. After dealers had refused or failed to sign the proposed marketing agreement, the Secretary had conducted a referendum of producers under the act to ascertain whether two-thirds of them approved it.

After the vote, which followed vigorous campaigns by both proponents and opponents, the Secretary found that the required number favored it and it was declared in effect. The fraud was said to consist of representations by its proponents that all producers would receive the same price for their milk and a conspiracy upon the part of certain proponents to convert the state and national acts into instruments for the creation of a monopoly in large handlers in the sale of fluid milk in the marketing area.

The opinion reverses the district courts holding which supported these contentions. JUSTICE REED explains the Court's view in the following language:

"While considering the manner of the adoption of the Order, the validity of the Act and the provisions of the Order must be assumed. The Order was submitted to the producers for approval after the hearings specified in the Statute. The full text of the Order with explanatory pamphlets was mailed each prospective voter. In the face of this fact, erroneous statements cannot be permitted to render the submission futile. There is no evidence that any producer misunderstood. A casual sentence in one of the pamphlets of the Department of Agriculture and a number of other statements in publications of the League and Agency were to the effect that dealers would pay all producers the uniform price for milk. Such assertions need the qualifications given in the Order that they are not applicable to milk sold outside the marketing area or to milk handled by cooperatives. The variation from the facts is not immaterial in view of the value or volume of milk involved. But the Order, Article VII, plainly stated that cooperatives were not covered by the payment requirements and it appeared, also, that milk sold outside the marketing area was not within its terms. A study of the official form of the Order would have cleared up any misconception created by the language. The Secretary of Agriculture declared that three-fourths of the producers affected by the Order approved its terms. The litigants do not deny that three-fourths of the voters voted for the institution of the Order. There is no authority in the courts to go behind this conclusion of the Secretary to inquire into the influences which caused the producers to favor the resolution.

"The coercion by the League and the Agency, exercised upon the handlers after the adoption of the Order to force or induce them to acquiesce in its operation, is of the same indirect character as the alleged misrepresentation. It is the partisan coercion of the producer seeking to compel dealer support of the plan by the threat of the use of his economic power over his own milk. The coercion was ineffective upon these defendants. Producers' organizations urged in their papers and meetings diversion of milk from handlers to influence them to agree to the Order. Such efforts could not have had an effect on the prior vote of the producers. It is quite true that the League which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act, authorizing cooperatives to express the approval or disapproval for all of their members or patrons. This is not an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

Defendants had contended that there was no statutory basis for that part of the order which exempted cooperative handlers from the payment of the uniform price and authorized payments to them from the producer settlement fund. The government denied that defendants could object to these terms since they are all handlers, and since only producers delivering milk to cooperatives are affected by the exemption and the payments. As to this, the opinion concludes:

"Although three of the defendants cannot complain of the benefits conferred upon cooperatives, for they are cooperatives, the defendant Jetter Dairy Company has standing to raise the issue of want of statutory authority to except cooperative handlers from the payment of the uniform price. It is a proprietary corporation, a handler of milk, required by the Order to pay uniform prices for the milk it purchases. . . . None of the defendants, on the other hand, is in a position to raise the issue of lack of statutory authority for the payments authorized by Article VII, Sections 5 and 6. Whether cooperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants' profit or loss depends upon the spread each receives between the class price and sale price. If the deductions from the fund are small or nothing, the patron receives a higher uniform price but the handler is not affected."

The opinion then determines that under the language of section 8c (5) F of the Act, that nothing therein prevents cooperatives from distributing net proceeds in accordance with its contract with its producers, the exemption of cooperatives from the uniform payment provisions is authorized.

Next the opinion considered whether the terms of the order show unconstitutional discrimination against one or more of the defendants. The Jetter Dairy Company, the proprietary handler, urged that the exemption of cooperatives from the uniform price payment requirement was unreasonable and made the order a violation of the due process clause of the Fifth Amendment. Refuting this contention, the opinion points out that both state and Federal legislation have accorded cooperatives different treatment and have encouraged them. It discusses their general character as follows:

"These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organzations have repeatedly been held to justify different treatment. The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.

"The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reactions would parallel those of

stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so. We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price."

Further discrimination was said to arise from that part of the order which limited minimum prices to milk sold in the marketing area or passing through a plant in that area. Other milk was "unpriced" and did not figure in the computation of the uniform price. It was claimed that handlers of both priced and unpriced milk were unreasonably favored as against those who handled only milk sold in the marketing area since large handlers may purchase milk throughout the milk shed at any price they please so long as it does not pass through a plant in the marketing area, and sell it outside the area at any price they please; thus, by selling at a greater profit outside, they could replace losses on New York area sales. The Court's view was that this was not discriminatory—since the possibility of such use of extra area trade profits existed even before the order, and is a competitive situation which the order did not create and with which it does not deal. Discussing the district court findings in this connection further, the opinion says:

"The District Court found that handlers of unpriced milk 'are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants.' 'If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof.' It is erroneous to suppose that by buying some milk at less than the minimum, the 'actual price' paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum but for the part sold in the marketing area or passing through plants there located the minimum is paid. This is all that justifies the language of the finding that 'the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price.'"

The district court had found that the provisions of the order which allow a special differential of 20 cents on milk from certain counties located most favorably to the marketing area, in order to enable handlers to pay the producers at these plants, the difference being absorbed by the handlers, were discriminatory as between producers and unfair to those defendant handlers who have no patrons in those counties. On the argument it was further urged that this gave additional advantage to the handlers' competitors with patrons in those counties because near locations have lower transportation costs and the differential by increasing milk prices to the producer stimulates production, which in turn means more benefit from the freight advantage to competitors. The opinion characterizes this discrimination as "fanciful and remote."

"It would not justify a court in overturning the Secretary's determination of the propriety of the differentials on evidence found by the lower court to be substantial. Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here."

Having thus disposed of all of the objections to the order, the opinion discusses the various objections to the constitutionality of the act. It was urged that the minimum prices authorized by the statute and fixed by the order were invalid, since the sale, a local transaction was fully consummated before interstate commerce begins, and any attempt to fix the price or other elements of that sale violates the Tenth Amendement. In answer to this, the opinion points out that the Federal power over interstate commerce is "complete and perfect" and that where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens, and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of congress extends also to the local sales. The opinion continues:

"The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Since *Munn* v. *Illinois*, this Court has had occasion repeatedly to give consideration to the action of states in regulating prices. Recently, upon a reexamination of the grounds of state power over prices, that power was phrased by this Court to mean that 'upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.'

"The power of a state to fix the price of milk has been adjudicated by this Court. The people of great cities depend largely upon an adequate supply of pure fresh milk. So essential is it for health that the consumer has been willing to forego unrestricted competiton from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by the municipal health authorities. It belongs to that category of commodities that for many years has been subjected to the regulatory power of the state. . . . The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce rests with the Congress in the commerce between the states."

It was objected that the provisions of the act and order which require handlers to clear their purchases through a producer settlement fund, or equalization pool, deprived them of liberty and property by taking away their right to acquire milk from their patrons at the minimum price class according to its use, and forcing them to pay their surplus, over the uniform price, to the pool instead of to their patrons. In rejecting this argument the opinion states:

"The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation, designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford* v. *Smith*, we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.

"Common funds for equalizing risks are not unknown and have not been considered violative of due process. . ."

The act was challeneged on three grounds as an unconstitutional delegation of power (1) because of the delegation of authority to the Secretary of Agriculture to establish marketing areas; (2) because of the delegation of authority to producers to approve a marketing order without an agreement of handlers and (3) because of the delegation of authority to cooperatives to cast votes of producer patrons. As to each of these, the opinion states the test to be whether the act states

(*Continued on page* 609)

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Oklahoma Repeals Act Creating Integrated Bar

AT THE close of its last session, the legislature of Oklahoma passed an act, effective July 28, that repeals the law that created an all-inclusive bar organization in that state.

In view of the advantages, from the point of view of both the public and the legal profession, achieved by the all-inclusive bar organization, the action of the Oklahoma legislature on the surface is astonishing and appears to be a decided step backward. The integrated bar is now generally recognized as a distinct improvement over the voluntary bar form of organization in that it brings a finanicial contribution from every lawyer to the solution of the problems of the bar. It is generally believed that a somewhat better job of examining and selecting new members of the bar is done in the integrated bar states. That they achieve better results in dealing with lawyers who are guilty of professional misconduct is generally conceded, and some assert that they do more effective work in stamping out unlawful practice of the law.

The cause of the repeal of the integrated bar is stated to have been a determination of some University of Oklahoma law students in the legislature to obtain the diploma privilege for their school so that they would not be required to take the bar examination. A few states do still have laws permitting graduates of the state university law school—and sometimes of other law schools in the state—to be admitted to practice upon presentation of their diplomas, but such laws are arbitrary and unreasonable since they require citizens of the state to take the bar examination even though they are graduates of law schools generally conceded to be stronger than the state schools.

The act of the Oklahoma legislature above referred to provided for admission without examination of the graduates of all "Class A" law schools, which are defined as schools belonging to the Association of American Law Schools, approved by the American Bar Association, or the Supreme Court of Oklahoma, or members of the National Association of Law Schools. The latter group consists of about twelve law schools, at least eleven of which are not approved by the American Bar Association. The Board of Bar Examiners submitted their resignations upon the passage of the bill, but apparently the resignations have not yet been accepted.

This action of the legislature does not purport to be based upon defective or unsatisfactory operation of the integrated bar, but rather to establish exemption from the requirement of passing a bar examination, a requirement that was approved in a memorable assemblage of lawyers, judges and legal educators in Washington, in 1922, when the requirement of two years of college work for admission to the study of law was also approved. The diploma privilege now exists in only a few states and these states, for the most part, have not adopted the requirement of two years of college work for admission to the bar.

On May 18, the Board of Governors of the State Bar of Oklahoma, which does not expire until July 28, adopted the following resolution:

"Recognizing that the Supreme Court has the inherent power to integate the Bar by rule, and that it is essential to the best interest of the Bar and the public that the Bar of Oklahoma be integrated, IT IS ORDERED that the President be authorized to appoint a committee of such number as he chooses, the President to be ex-officio Chairman thereof, to present an application to the Supreme Court to integrate the Bar, including the preparation and presentation to the Supreme Court of suggested rules for the integration of the Bar of Oklahoma."

The president appointed a committee of ten which has already drafted rules that were presented to the lawyers of Oklahoma for consideration and criticism in the June issue of the Oklahoma State Bar Journal. These rules will ultimately be presented to the Supreme Court of Oklahoma, with the request that it incorporate them in an order integrating the bar, as has been done in other states.

Bar Committee Objects to Derogatory Cartoon

The Public Relations Committee of the Philadelphia Bar Association recently protested against a cartoon, published in The Evening Bulletin, depicting three graduates of "Prof. Blotso's Law School" running out of the doors of the school with their caps, gowns and diplomas, in close pursuit of an ambulance, which is speeding away, much to the consternation of a nearby policeman and spectator.

The Committee thought the cartoon entirely unfair to the legal profession and felt that some type of action should be taken to prevent adverse publicity of this kind from appearing in newspapers and elsewhere.

The letter of protest said:

"The alleged joke is not new, nor original, and is not very funny. It relates to a figment of the imagination, on the part of the author, which probably finds responsive echoes in the minds of the unthinking and uninitiated public, which unquestionably reflects seriously and unfavorably upon the profession, and has a tendency to bring us into disrepute.

"If the radio, the press, and the movies would only stop this sort of thing, it would be a big help towards raising the profession in the minds of the public, and would be giving the profession a much fairer treatment. Of course, none of us, even the newspapers, are perfect, but the entirely gratuitous and unfair criticism of an ancient and honorable profession, such as the picture indicates, should be stopped immediately."

The editor's reply, in part, was as follows:

"Reports from our readers indicate that the "Off the Record" cartoon of which you complain was received with amusement, appreciation and understanding.

"We believe that the cartoon was not only a proper cartoon to publish for its entertainment value but also that it might well serve Bar Associations in a useful purpose."

That the bar is injured by bad publicity, of which the above may or may not be considered a good example, is not open to doubt.

In a recent report to the St. Louis Bar Association, its committee on Economics of the Legal Profession attributed much of the present economic difficulty of lawyers to the adverse publicity which the whole profession receives from the manner in which improper activities of a small minority of lawyers are publicized.

The general matter of undeserved unfavorable publicity of the bar deserves serious consideration. Each bar association should have a permanent committee, as recommended by the St. Louis Committee, referred to

above, "to investigate statements in the press, on the radio or elsewhere, which might be of a derogatory nature to the bench or bar" with a view to seeing that proper disciplinary action is taken against lawyers whose conduct merits it. But some committee should have the duty to make contact with radio broadcasters and publishers with a view to the development of a concern in them that publicity concerning lawyers shall not be of such a nature that the unthinking will infer that the occasional lawyer who is guilty of misconduct is typical.

A New Weapon to Combat Ambulance Chasing

On January 18, 1939, one Frank Sevedin was found guilty of contempt of court by the Circuit Court of Wayne County, Michigan, in case No. 64,503, wherein the Respondent was found to have been acting as a "runner" for an attorney; occupying space in the attorney's office and paying no rental therefor, except that of procuring law business for the attorney.

THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,
H. W. ARANT, Chairman.

JUNIOR BAR NOTES

BY JOSEPH HARRISON
Secretary of Junior Bar Conference

PREPARATION for the Annual Meeting of the Junior Bar Conference at San Francisco, July 9-13, has engaged the attention of the official family of the Conference for the past two months. Exceptionally fine reports from most state chairmen and public information directors, as well as from the several Conference committees, indicate that the current year has set a record for Conference accomplishment and for new members obtained.

Charles E. Pledger, Jr., Washington, D. C., Chairman of the Program Committee, advises that the program for this Annual Meeting promises to be more interesting than any heretofore. This is because provision has been made to give the state chairmen and individual members a greater part to play in the proceedings. Added to this will be the unusually full program of entertainment planned by the Entertainment Committee, headed by James L. Feely of San Francisco. We say "unusual" because coupled with the renowned traditional hospitality of Californians will be the San Francisco Exposition at Treasure Island, which is to be a most interesting and enjoyable part of the program.

It is apparent that with the Conference business provoking enthusiastic interest, and the lighter side of the program so well provided for, this convention will be a memorable one to every Conference member who will be in attendance. There is every inducement to members to make an effort to attend. Rail fares have been so reduced that it is possible to make a complete round trip from New York to San Francisco for $90.00, with another $10.00 for meals. Under these conditions a record attendance is expected.

But Conference activity during the past two months has not been devoted exclusively to convention preparation. The numerous radio and platform speeches, arranged for early in the year, are still being made in many parts of the country, under the auspices of the Conference's Public Information Program.

On May 7th, the officers of the Conference met with the Budget Committee and Sub-Committee on the Junior Bar Conference of the Board of Governors. Finances and activities of the Conference for the current year and for next year were discussed. The Conference officers felt gratified at the satisfaction with its work expressed by many responsible members of the Association's official family. It is apparent that all appropriations heretofore made for the Junior Bar Conference have been excellent investments for the American Bar Association, and that provision of adequate funds for future Conference activities should receive favorable attention from the proper Association officers.

Regional meetings of Junior Bar Conference members were held at Shreveport, La., and New York City during May. The Shreveport meeting was held on May 13, 1939, for members of the Conference from the states of Louisiana, Texas, Mississippi and Arkansas. Leon Sarpy of New Orleans, Conference Chairman for Louisiana, presided at the opening session held at the Washington Youree Hotel. After the invocation was pronounced, Whitfield Jack, of Shreveport, delivered the address of welcome. Chairman Ronald J. Foulis then gave an interesting account of the activities and aims of the Junior Bar Conference, followed by Council Member Peyton D. Bibb of Birmingham, Alabama, who portrayed the historic events leading to the present situation in the legal profession.

The afternoon session was presided over by Bronson Cooper Jacoway, Little Rock, Arkansas State Chairman. H. Howard Cockwill, also of Little Rock, Council Member from the Eighth Circuit, outlined the business and entertainment program for the San Francisco Annual Meeting. Professor Lennart Larson of the law faculty of Baylor University spoke on "The Law School and Its Alumni." After a brief business session the meeting was adjourned. Members in attendance then repaired to Barlesdale Field, reputed to be the largest army flying field in the country, where, through arrangements made by Mr. Jack, Lieutenant Stoltz, U. S. A., explained the functioning of the post. The evening banquet was featured by an inspiring address by former Judge Cecil Morgan, of Shreveport, on the subject of young lawyers in politics. Enthusiasm was engendered among those present for the Conference program and for attendance at the San Francisco meeting.

On May 12, 1939, at Cleveland, Ohio, Andrew J. Duncan, Ohio Membership Chairman for the Conference, assisted by F. J. Amer, H. E. Back, C. E. Brill, V. R. Burt, H. E. Green, F. Leonetti, H. J. McNeal, R. M. MacArthur, I. W. Megger, S. H. Moss, J. M. Poe, L. E. Richards and K. A. Gaft arranged for the annual smoker of the Ohio members of the Junior Bar Conference. David Davenport, newly elected president of the Cleveland Bar Association, was the principal speaker. The smoker was preceded by a dinner at the Hermit Club. During the smoker there was a musical program and refreshments were served.

An informal reception was accorded to Conference Chairman Foulis on May 16, 1939 in the Lounge Room of the Chicago Bar Association, by Illinois members of the Junior Bar Conference. James P. Economos of Chicago, Council Member of the Seventh Circuit, was in charge of the arrangements. Illinois State Chairman Amos Pinkerton of Taylorville headed the Reception Committee, which included many of the Confer-

ence's more active members. Addresses by Mr. Foulis and Albert E. Jenner, Jr., of Chicago were made. The reception and meeting served to introduce to the Conference and its program all newer members who had not theretofore been active. The reception and meeting were held at 4:30 p.m., which permitted many of those present to attend the dinner of the Chicago Bar Association that evening.

The Junior Bar Conference is winding up its most successful year since its organization in 1934. The cumulative efforts, planning and experience of five years have given the Conference a momentum which has made it the fastest growing and most active section of the Association. On the San Francisco agenda are several items concerning the improvement of the program of the Conference in many important aspects. With a feeling of substantial accomplishment during the past year, the Conference eagerly looks forward to the attainment of new heights of achievement during the year 1939-1940.

The Shade of Sir Edward Coke Reports the Baseball Game Played Between the Law School Faculty of Northwestern University and the Law Review Editorial Board on Tuesday, the 9th Day of May, 1939

KNOW that this day *post meridiem* it did fall to my fortune to witness *oculis meis* a certain contest or controversy betwixt sundry professors of the law and sundry *apprenticii ad legem, videlicet* a certain game or play of *pila*, hitherto unknown to me, yclept "base-ball." The word base, be it noted, doth not here signify any sense of derogation or inferiority, as in base fee, base services, base court or the like, whereof ye will find right pleasant discourse in Monmaister Littleton. No more doth it come to application because of any *malum in se* on the part of the participants (although the whisper did run that one or more of the players among the *professores* were *annulatores* or ringers, but as to this supposal I say nothing, seeing that I have no means of verification). The term, be it said, cometh from the circumstances that certain bases or rectangular pouches (sometimes spoken of as *sacci* or bags) do mark certain stages in the course whereon the players do seek to run. The end, aim or *exitus* of the game, wit ye well, is to determine and adjudicate which of the two sides or parties shall attain *plures cursus* or the larger tally of runs. Each side or party in its turn sendeth in, one by one, to the *bractea domestica* or home plate a number of players, each armed with a *baculinus* or cudgel, yclept a bat or swat-stick. Therewith he, the *baculinator*, smiteth or (to speak with fairer accuracy) he endeavoreth to smite, *vi et armis*, the *pila* which is projected to him, equally *vi et armis*, by one of the adverse party known as the *pilarius* or pitcher, stationed on the *collis* or mound. If thrice he smiteth in vain, or faileth to smite when thereto bound, then the case is said to be that of *tres ictus* or three strikes, whereupon he is *exclusus* for the time being: he hath, so to speak, suffered for the nonce a discontinuance. But if *per contra* the *pilarius* to him propelleth the ball four times *irregulariter*, even though the *culpa* be but *levissima*, then what ensueth is that there is conferred upon the *baculinator* a *donatio* of one base. This is a *donatio stricti juris* and may with propriety be termed a *donatio causa pilarum irregularium*, sithence the vernacular hath it "base on balls" or *basis supra pilas*. If he smiteth successfully, that is to say, with violence to a certain intent in particular, the *baculinator* may run, if not estopped by the *insidia* of the opposite party, until he hath made the full circuit of the bases, in which case he is said to have attained a *cursus ad domum* or home run. Should he reach but the primary base, he is said to have achieved a *singulus* or single, but if he goeth farther without estoppel, but yet is estopped before he reacheth the *domus*, it may be that he has achieved a *duplex saccus* or *triplex saccus* (called in *lingua Americana* a "two bagger" or a "three-bagger") as the event shall prove. More I would fain say of the discipline of this play but, time wanting, I would refer to the *regulae generales* thereof which I pray may be taken as part of this breviate, the same as if fully embodied herein.

As therefore appeareth, the play which I thus did witness is quite foreign to anything I have seen among the professors and students of our Inns. Yet it hath many points of interest, so much so that those attending did ofttimes wax merry and as oft did comport themselves *riotose*, and even I did find myself giving way to multifarious emotions and manifesting noises of great moment, as one or the other of the parties did make advance by means of percussion of the said ball and consequent coursing of the said bases. It behooveth me to report, however, that as compared with the *apprenticii* the *professores* did seem to be singularly lacking in skill. But *non obstante*, for some reason that passeth my understanding, victory lay with the *professores*. A circumstance none the less which I greatly applaud, as it tendeth to heighten the dignity and standing of the *professores* and to enhance the respect with which it behooveth the *apprenticii* to listen to their readings. And since the *professores* all seemed to be of fair countenance and good bearing, there is little ground for fear that they will resort to vainglorious jactitation, or fail to heed the maxim *excessus in jure reprobatur*, or withal depart from that modest demeanor which is the becoming appanage of their office.

Postscriptum

It hath of late come to my ears that one of your company, Master Samuel Thorne, doth busy himself, in and about the editing of one or more so-called manuscripts of that foul fellow Ellesmere, on whom be a murrain. This Master Thorne discourseth excellently well in his *scripta* and hath mightily pleased me by what he hath indited concerning myself. And so it likes me not that he should waste his good ink on the tripe that cometh from the knavish pen of so great and notorious a viper, and despoiler of the common law. So let Master Thorne bethink himself before he consigneth his writings to the press lest he give aid and comfort to that varlet, that misbegotten usurper, that *hostis humani generis* who calleth himself by the foul name of Ellesmere.

R. W. M.

EIGHT MONTHS UNDER THE NEW RULES*

By Walter L. Brown
Member of the Huntington, W. Va., Bar

THE task of reading and classifying all of the published opinions which apply or construe the new rules turned out to be more arduous than anticipated. At first it looked fairly simple. There were only six opinions involving the rules in Volume 24 of the Federal Supplement. However, they increased in number very rapidly with the result that in the more recent advance sheets practically every reported opinion of the District Courts involves some application of the rules.

Since September 16, 1938, and until the advance sheet of May 29th of this year, there have been reported 152 opinions applying or construing the rules. This count includes only those published in the reports and does not take into consideration opinions which may have been digested in the American Bar Association Journal but have not as yet appeared in the reports.

The 152 opinions were divided between the various courts as follows: District Courts, 123; Circuit Courts of Appeals, 17; and 2 in the Supreme Court of the United States.

Mr. Justice Reed may claim the distinction of first citing the new rules in the Supreme Court of the United States. On February 6th of this year, in *City of Texarkana v. Arkansas Louisiana Gas Co.*,[1] he stated that a supplemental pleading should be filed under Rule 15(b) when the case returned to the District Court. Subsequently Mr. Justice Frankfurter had occasion to cite Rule 6(c) in *Sprague v. Ticonic National Bank*.[2] It is of some interest that Mr. Justice Frankfurter quotes the note of the Advisory Committee as disclosing the purpose of the rule.

Apparently the District Court of New Jersey was the first court to apply the new rules in a reported opinion. In *Sauer v. Newhouse*,[3] handed down exactly one week after the rules became effective, the court construed and applied Rule 19(b). Directors who were parties defendant to a stockholders' suit seeking restitution for alleged mismanagement sought to bring in other directors by motion under Rule 19(b). It was held that the rule did not compel the joinder of the other directors because they were not indispensable parties and complete relief could be given as between the plaintiffs and the defendants.

Though the Ninth Circuit cited the rules in an earlier case[4] which did not involve their application, the first case in a Circuit Court of Appeals which actually involved the rules was in this Circuit. *National Bondholders Corporation v. McClintic*,[5] decided on November 10th, 1938, was a proceeding in mandamus seeking to compel a district judge to vacate an order staying the taking of depositions under the new rules. Holding that a district judge exercises a discretionary power in staying depositions upon motion pursuant to Rule 30(b) and that the case did not disclose "a clear abuse of discretion," the Fourth Circuit Court of Appeals denied the writ.

Some further statistics concerning the decisions thus far under the rules are interesting and may offer something of significance.

While the 123 District Court opinions have come from 25 different states, 41 of that number, or exactly one-third of the total, have come from the State of New York. Pennsylvania and Massachusetts follow with 17 and 14 decisions, respectively, and the next highest number from a single state is 5.[6] Thus we have a total of 72 decisions, or well over half of those handed down by District Courts, from three eastern states.

These figures are significant because it is principally in the District Courts that the application and construction of the new rules will be fixed. Naturally District Judges will be inclined to follow the trend of earlier decisions in other districts and such a course has been facilitated by the fact that the Department of Justice circulates mimeographed copies of each opinion under the rules to all federal judges. Thus it would seem that the construction of the new rules may be supplied by New York, Pennsylvania and Massachusetts. Of course we know that New York, which has supplied one-third of the decisions thus far, is the original code state. Pennsylvania and Massachusetts are usually classified as quasi-code states.[7]

Only 29 of the 152 decisions, or approximately twenty per cent of the total, cite any authority. Eighty per cent of the opinions merely apply the language of the particular rule involved.

Except for the citation of earlier district court decisions in the later opinions, the authorities cited have been as follows: *Moore's Federal Practice under the New Rules*, 11 cases; *Edmunds' Federal Rules of Civil Procedure*, 1 case; law review articles, 3 cases; decisions under the old equity rules, 4 cases; decisions under English procedure, 1 case; comments of members of the Advisory Committee at the respective Institutes, 4 cases; the Advisory Committee notes to the Rules, 5 cases; and decisions under similar state statutes, 2 cases.

The most significant fact to be derived from reading the cases is that the courts are treating the rules

*Remarks at Judicial Conference of the Fourth Circuit, Asheville, North Carolina, June 9, 1939, to which footnotes have been added.

1. 59 Sup. Ct. 448.
2. 59 Sup. Ct. 777.
3. 24 F. Supp. 911. See the editorial comment on this decision in Bulletin No. 1, p. 913. See No. 11, Vol. XXIV A. B. A. J.
4. *Stokes v. United States*, 99 F. (2d) 283.
5. 99 F. (2d) 595.
6. The District Court opinions from the various states were as follows: New York, 41; Pennsylvania, 17; Massachusetts, 14; Connecticut, Mississippi, Missouri and Oregon, 5 each; New Jersey, Illinois, Delaware, North Carolina and West Virginia, 3 each; California, Maryland, Oklahoma and Washington, 2 each; Minnesota, Nebraska, Georgia, Tennessee, Louisiana, Arkansas, District of Columbia, Montana and Ohio, 1 each.
7. See Clark, Code Pleading, (1928), 21-22.

as tools to be used in the administration of justice instead of mandates to be construed and applied strictly. Among the 152 decisions examined, there were only two which I could unqualifiedly classify as having given a strict interpretation to the rules. Both of those decisions were from the same court and by the same judge.

In *Standard Surety & Casualty Company of New York v. Baker*,[8] the District Court of Missouri gave what appears to be an unduly restricted application to Rule 22 providing for interpleader. An insurance company had issued a bond protecting those dealing with a certain company and its agents against loss by reason of wrongful or illegal acts. Claims exceeding the limit of the bond had been made against the insurance company and it made all claimants parties defendant to a bill of interpleader.

The Court held that the interpleader was not proper under Rule 22, apparently because the respective claims arose from separate acts of the principal.[9] In holding that the complaint did not come within the Federal act, as distinguished from the rule, it was said, "The admirably expressed views of Judge Chesnut in *John Hancock Insurance Co. v. Kegan*, D. C., 22 F. Supp., 326, cannot prevail against all authority." Yet, in applying Rule 22, the Court overlooked the fact that the Advisory Committee cites the *John Hancock* decision in the note to the rule and clearly indicates that the committee intended to adopt the "admirably expressed views" of Judge Chesnut which would apply a very liberal construction to Rule 22.

In a later case[10] the same judge gave what appears to be a very strict construction to Rule 35 providing for mental and physical examination. The case involved an action for libel against a doctor who published a medical article commenting upon the plaintiff's physical condition. The answer set up the truth of the article and the defendant moved for a physical examination. The Court refused to allow the examination holding, in effect, that the historical background of Rule 35 required that its application be confined to personal injury cases.[11]

The rule which has been most often applied and construed is Rule 12(e), relating to motions for bills of particulars. There have been fifteen decisions under this rule—more than twice the number under any other rule—and they have come from nine different states.[12] The difficulty has arisen through the attempts of counsel to make a motion for a bill of particulars serve the same purpose as interrogatories under Rule 33. As a result the courts are tending toward a construction of the rule which might be deemed strict. There has been a tendency to differentiate between the information to be obtained by a bill of particulars and interrogatories, respectively, through the application of a distinction between ultimate facts and evidence. See *Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co., supra*,[12] and *Bicknell v. Lloyd-Smith, ibid.* Since the distinction between "ultimate facts" and "evidence," always very difficult to apply, has been avoided in Rule 8(a), it would seem to be inadvisable to bring that distinction into the application of Rule 12(e).

Another case seems to hold that the information allowed under a motion for a bill of particulars will be confined to that necessary to enable the movant to answer and he will be relegated to interrogatories or other means of discovery for information needed to "prepare for trial." *Fried v. Warner Bros. etc. Corporation, ibid.* This seems too strict because Rule 12(e) obviously contemplates information needed to prepare for trial though not necessary for the purpose of filing a responsive pleading.

Probably the distinction pointed out in the following quotation from *American etc., v. American Oil Co., supra*, though indefinite, is the most workable:

> "There should be a marked difference between information that can be elicited under a bill of particulars and that which may be elicited through interrogatories. The latter, under the new rules, is very broad. The former should be limited to such information as would be necessary for the defendant to prepare its pleadings, and *generally* prepare for trial."

Gumbard v. Waterbury etc. Corporation, supra, seems to lay down the rule that a motion for a bill of particulars cannot request information in the possession of a defendant but which he wishes added to the complaint in order to pave the way for a motion to dismiss. It is believed that this holding puts too literal an interpretation upon the wording of Rule 12(e). Also, since the legal insufficiency of the complaint can be raised in the answer, it would appear that the additional facts sought by the motion for a bill of particulars are proper to enable the defendant "to prepare his responsive pleading."

Three very interesting questions are raised by the decisions thus far which I shall merely indicate without discussion.

One case[13] has raised the question as to whether judgment will be awarded against a third party defendant in favor of the plaintiff where the third party was brought in solely because of his alleged liability to the plaintiff (as distinguished from being liable over to the original defendant for contribution or indem-

8. 26 F. Supp. 956.

9. The Court seemingly construes the words "double or multiple liability" as referring only to such liability upon the same claim, i.e., where two persons adversely assert the right to, and seek to recover upon, the same "claim." Thus, though the plaintiff insurance company might suffer double or multiple liability upon its bond by reason of judgments against it upon the respective claims of persons dealing with the principal, aggregating more than the limit of the bond, the Court concluded that the rule did not apply. It seems to the writer that the situation before the Court was one to which the rule should clearly apply. The bond was the obligation of the insurance company and it was certainly threatened with double or multiple liability on that obligation.

10. *Wadlow v. Humberd*, 27 F. Supp. 210.

11. In considering the language of the rule, the Court reasons that "the mental or physical condition of a party" must be directly in controversy before the rule applies and concludes that the physical condition of the plaintiff was not directly in controversy despite the fact that, in view of the answer setting up the truth of the statements of the defendant, it seems that the case will turn upon the physical condition of the plaintiff.

12. The cases under Rule 12(e) are as follows: *Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co.* (Del.), 25 F. Supp. 598; *Bicknell v. Lloyd-Smith* (E. D. New York), 25 F. Supp. 657; *Bobrecker v. Denebeim* (W. D. Mo.), 25 F. Supp. 208; *Talbet v. Thorpe* (W. D. Pa.), 25 F. Supp. 222; *American LaFrance Foamite Corp. v. American Oil Co.* (D. C. Mass.), 25 F. Supp. 386; *Schmidt v. Going* (W. D. Mo.), 25 F. Supp. 412; *Sierocinski v. E. I. Dupont DeNemours & Co.* (E. D. Pa.), 25 F. Supp. 706; *McKenna v. United States Lines* S. D. N. Y.), 26 F. Supp. 558; *Fried v. Warner Bros. Circuit Management Corp.* (E. D. Pa.), 26 F. Supp. 603; *Abruzzino v. National Fire Ins. Co.* (N. D. W. Va.), 26 F. Supp. 934; *Lost Trail, Inc. v. Allied Mills, Inc.* (E. D. Ill.), 26 F. Supp. 98; *E. I. Dupont DeNemours & Co. v. Dupont Textile Mills, Inc.* (M. D. Pa.), 26 F. Supp. 236; *Murphy v. E. I. Dupont DeNemours & Co.* (W. D. Pa.), 26 F. Supp. 999; *Tully v. Howard* (S. D. N. Y.), 27 F. Supp. 6; *Gumbard v. Waterbury Club Holding Corp.* (Conn.), 27 F. Supp. 228.

13. *Crim v. Lumbermen's Mutual Cas. Co.* (D. of C.), 26 F. Supp. 715.

nity) and the plaintiff has refused to amend so as to assert a claim against the third party defendant. Without deciding the question, the Court said that it was inclined to believe that no judgment could be rendered and cited decisions under the analagous admiralty rule.

The application of the jurisdictional requirements to third party proceedings is raised in one published opinion.[14]

The third question of some interest is the extent of the application of the rules to copyright proceedings. While three cases have assumed that they have no application because of the language of Rule 81(a), the District Court for the Southern District of New York[15] has held that they apply, as far as applicable, except to the extent they are inconsistent with the existing rules for copyright cases promulgated by the Supreme Court. This decision points out that those rules, promulgated in 1909, provide that the existing rules of equity practice shall be in force "so far as they may be applicable." The decision concludes that the new rules of civil procedure are the existing equity rules within the meaning of that provision.[16]

In conclusion it should be observed that no case has been found in which any substantial right of a litigant was prejudiced by the application of the new rules. There are a number of instances where lawyers have "slipped up" through lack of familiarity with the rules but no harm to the interests of the client resulted in any instance. Demurrers have been construed as motions to dismiss under the rules, amendments have been allowed freely and the default provisions have not been enforced where a party has refused the more extensive discovery allowed under the new rules.[17]

14. *Crum v. Appalachian Electric Power Co.* (S. D. W. Va.), 27 F. Supp. 138. The question is also raised in *Bossard v. McGwinn*, decided by the District Court of the Western District of Pennsylvania on March 23, 1939. The latter opinion does not appear to have been published though it is digested in the American Bar Association Journal of May, 1939.

15. *White v. Reach*, 26 F. Supp. 77. For cases assuming that the new rules have no application to copyright cases in the absence of a future rule of the Supreme Court making them applicable, see: *Basevi v. Edward O'Toole Co.* (S. D. N. Y.) 26 F. Supp. 41; *Michelson v. Crowell Publishing Co.* (Mass.) 25 F. Supp. 968 and *Sheldon v. Metro-Goldwyn Pictures Corp.* (S. D. N. Y.) 26 F. Supp. 134.

16. On June 5, 1939, the Supreme Court ordered the rules made applicable to actions to enforce claims arising under the Copyright statutes.—ED.

17. For example see: *Shell Petroleum Corp. v. Stueve* (Minn.), 25 F. Supp. 879; *Ashman v. Coleman* (W. D. Pa.), 25 F. Supp. 388; *Walsh v. Conn. Mutual Life Ins. Co.* (E. D. N. Y.), 26 F. Supp. 566; and *Beler v. Savarona Ship Corp.* (E. D. N. Y.), 26 F. Supp. 599.

LAW LISTS AND THE PUBLIC INTEREST

Sweeping Character and Extensive Ramifications of the Law List Problem Have not Been Generally Recognized—Failure of the Profession in the Past to Recognize the Conditions That Had Developed—Enumeration of Affected Groups Shows How Broad and Substantial is the Public Interest in the Question—Methods Followed by Association's Special Committee on Law Lists in Its Work—Opportunity for, and Necessity of, Carefully Planned Public Relations—Rules and Standards, etc.

BY STANLEY B. HOUCK
Member of Special Committee on Law Lists; Member of Minneapolis Bar

THE extremely broad and sweeping character and the extensive ramifications of the law list problem have not, generally, been recognized. Lawyers, as well as others who are affected, have failed to appreciate the number and scope of the activities and functions of these instrumentalities. Too many lawyers think of the matter only as one affecting a few law list publishers and a limited group of lawyers who have been listed in a relatively small number of law lists. Their utility and that they are now indispensable to the public, especially to the commercial, trade and business public, the directness of the effect upon it and its deep concern regarding whatever affects law lists, have not been adequately sensed.

Before the Rules and Standards as to Law Lists were adopted by the House of Delegates of the American Bar Association at its meeting, September 30th, 1937, at Kansas City, Missouri, the only reference to law lists found in the canons was in canon 43, which read: "A lawyer's professional card may with propriety contain only a statement of his name (and those of his lawyer associates), profession, address, telephone number, and special branch of the profession practiced. The insertion of such card in reputable law lists is not condemned and it may there give references or name clients for whom the lawyer is counsel, with their permission."

One of the reasons for the prevailing lack of appreciation and intelligent understanding of the law list problem has been the failure of the profession, generally, to realize what had been occurring in the past,—what conditions had developed. When the words "law lists" were used many thought only of the commonly seen and used commercial and specialized lists. That many other publications and instrumentalities, of the character of law lists, had grown up, were a part of, and had contributed to the complexities of the problem was entirely overlooked.

The names of lawyers, presenting themselves as available for professional employment, had been presented or published by means of many widely different instrumentalities. There were: (1) general legal directories purporting to contain the names of all lawyers and somewhat similar directories attempting to list all lawyers said to be practicing in a particular field of the

law, such as insurance law; (2) so-called commercial law lists containing the names of a limited number of lawyers represented to be qualified to handle commercial claims and somewhat similar lists presenting the names of lawyers as competent to render legal services in restricted fields of the law; (3) general university or college directories of undergraduates and alumni, setting forth or classified according to occupation and profession, or somewhat similar directories or lists of the undergraduates or alumni of a college of law, both, oftentimes, containing professional cards; (4) rosters and membership lists of general, or legal, fraternities and similar societies, showing professions and occupations and, frequently, indicating, in respect of lawyers, whether engaged in active practice, on the bench, a teacher of law, or in another line of endeavor; (5) national, state and local bar association membership lists and somewhat similar lists of members of more restricted associations or societies of lawyers engaged in limited fields of the law, such as in patent, trade mark or copyright law, in practice before the Interstate Commerce Commission, etc.; (6) commercial, trade or business publications or journals containing the names of lawyers and their cards; and (7) a variety of card index systems, bureaus of information supplying names and addresses of lawyers responsive to requests by letter, telephone or telegraph, and the like. The foregoing enumeration is by no means complete.

What constituted a reputable law list nowhere was defined until the Rules and Standards were adopted. They declared: "Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment shall be deemed a law list."

Before the adoption of the Rules and Standards, there had been considerable confusion regarding the media in which a lawyer might ethically present his name to the public. The Association's Committee on Professional Ethics and Grievances had been called upon repeatedly to pass upon the ethical questions involved. For example, it had condemned the publication of a lawyer's card in association and society journals and programs; the sending of a card by a lawyer to other lawyers stating that he was "prepared to appear for them"; the publication in the daily newspapers of a metropolitan city of a lawyer's business card or of a lawyer's name in a list of names attached to a Christmas greeting. (Opinions 24, 36, 69, 107). In Opinion 116 it had held that "it is ethically improper for a lawyer to insert his name in a list of lawyers published in a magazine devoted to insurance matters." The Rules and Standards now specifically provide that: "No Law List shall be approved or continue to be approved * * if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal."

The objective of all of these instrumentalities is to enable one who has legal business to select a competent attorney to perform that business for him. The ideal way to deal with such business, of course, is for the client to turn it over to his attorney for forwarding or other handling and to thereby relieve himself from further concern in respect of it. However, the evolution of law lists and the growth and extent of professional and public reliance upon them have made any such procedure, presently, both impossible and impracticable.

The current need for law lists arises out of the need for legal services which inevitably grows out of the conduct by a client of a business which reaches beyond the immediate locale of its source and from his dealings with customers at outlying or remote places; out of the inability, or unwillingness of his attorney to furnish him with the name and address of attorneys competent to render legal services at the many points at which the client needs that service; and out of the client's unfamiliarity with the name and address of such attorneys and the means, other than law lists, by which to ascertain them. In such a case, the client and the attorney are not within reaching distance of one another.

The publication, distribution and use of law lists affect and involve, quite directly, at least the following groups: (1) the law list publishers, (2) the lawyers listed in law lists, (3) the creditors or claimants whose accounts or claims reach the listees through use of the lists, (4) the large number of intermediaries, such as collection agencies and the like, who, oftentimes, select the attorney for the client as the latter's agent or representative, (5) other lawyers interested in performing services of the same general type as are performed by those listed in the law lists but who are not listed because they do not choose to be or because, for some reason, they cannot obtain a listing; and (6) the remaining members of the profession, as a general, collective unit and their bar association or other professional representatives.

The foregoing enumeration of affected groups shows how broad and substantial is the public interest inherent in the entire law list problem. More significant, however, is the fact that the lawyer's privilege of presenting himself, in this manner, as available for professional employment constitutes a very specific and limited exception to the course he would otherwise be expected to follow. This exception is made more impressive because it is the only one of its character. Such an exception can be justified only by the public interest.

What has been said, more or less preliminarily, suggests both the opportunity for, and the necessity of, well and carefully planned public relations.

The Association's Special Committee on Law Lists has been confronted from its inception by these conditions and has recognized and appreciated these challenges. In a limited and informal way, its functions and activities are similar to those of the many state and federal administrative agencies. The Association has prescribed Rules and Standards as to Law Lists. The Committee was charged with their interpretation, administration, and enforcement. Both the public interest and effective and constructive public relations, required that the Committee meticulously avoid the errors of practice and procedure which have resulted in so much criticism and complaint of the manner in which many more powerful and important tribunals have conducted their affairs. It has sought to ascertain what is essential in the public interest and what will further improve public relations by conferences with, and "hearing" of affected and interested groups, by questionnaires designed to elicit the attitude and needs of, and other relevant information from numerous individuals making up such groups, by maintaining an office in down-town Chicago, in charge of its secretary, readily accessible to those seeking information and an opportunity for informal discussion of their problems and finally, by dealing, with an almost unbe-

lievable volume of telephone calls and correspondence from every conceivable source responsive to a general invitation broadcast as widely as practicable.

The Committee first concerned itself with the urgent problem of receiving the applications of publishers for approval of their lists under the Rules and Standards. It soon discovered that fair treatment and a full opportunity to know what the Committee contemplated and to be heard fully thereon made it necessary to create committees representing publishers generally and sub-committees representing the different types of law lists. These committees have been functioning continuously and actively for more than a year —since within a few months after the Committee held its first meeting. Not only have they enabled the Committee to benefit from the information, the counsel and advice of law list publishers and the reasons presented in support thereof but, also, they have developed the most friendly and cooperative spirit between the Committee and those upon whom its action falls most directly. To round out this procedure, it is understood that any individual publisher, who feels that he cannot present his particular matter appropriately through one of the committees, is free, without restraint or embarrassment, to present it directly to the Committee or its chairman. As a result of the "hearings" and conferences conducted in this manner, there has been almost unanimous agreement in respect of everything done by the Special Committee on Law Lists.

Only the most sketchy and inadequate reference can be made to what has been developed by these methods. Perhaps, even, the most important of them are not included.

The Rules and Standards provide that: "No Law List shall be approved or continue to be approved (a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law."

The Committee's check and analysis of the law lists first submitted to it, with the original applications of their publishers for approval, disclosed that many of them were lists of lawyers, collectors and collection agencies, notaries public, justices of the peace, or of lawyers and lay insurance adjusters and that, in some cases, lawyers listed were not authorized to practice in the state wherein was located the point to serve which they were listed. The number of lawyers and laymen in any one of these lists varied considerably although, usually, the laymen were in the minority.

After full discussion and consideration, both law list publishers and the Committee agreed that the public interest required that lawyers alone be presented as probably available for professional employment. Hence, laymen have been entirely eliminated from all law lists. This elimination was felt to be necessary, particularly, in cases where the laymen listed are prone to practice law illegally. Lawyers not licensed to practice at points for which listed were required to be eliminated unless expressly authorized to practice there by comity or otherwise.

An interesting incident in this connection was presented by a list which, in a single volume, published the names of attorneys, doctors and dentists. While it was recognized that doctors and dentists were not seeking to practice law, as might collection agencies and adjusters, they were excluded because the American Medical Association informed the Committee that it was unethical for a doctor to permit his name to be listed at all in such a list. The Committee felt that it should not approve a law list which published the names of those who were listed in violation of the ethics of their profession.

Very soon after the Committee began to function, it heard from the publishers of university and college directories, fraternity rosters, bar association membership lists and the like.

Several bar associations had rather ambitious plans for the publication of lists of members which they hoped would be used for the forwarding and transmitting of legal business. Some of these lists resorted to very pointed suggestions and, sometimes, urgent importunities, varying in directness and emphasis, that the lawyers so publicized be given exclusive or preferred employment. Both the form of the publication and this particular form of touting, were in many instances contrary to the provisions of the Rules and Standards that "no Law List shall be approved or continue to be approved (d) if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein." The publishers of this type of list, felt that it should not be subject to the provisions of the Rules and Standards and should be free from any restraint or supervision. The Committee, conformable to the procedure just described, held numerous hearings and conferences with the publishers. After hearing them, investigating the matter thoroughly (including a careful check of a very large number of publications of this kind), the Committee, largely controlled by the fact that such lists were not widely distributed, almost never were distributed to the commercial public and, hence, were not "maintained or published primarily for the purpose of circulating or presenting" the names of lawyers as probably available for professional employment, decided that:

"The roster of, a legal fraternity, the graduates of a law school . . . without classification, comment, or assurance through any method or device which is designed to advertise that the individuals named are qualified, able, or desirous of handling or receiving legal employment and without any intimation or suggestion that such roster presents the names of attorneys as probably available for professional services, is not a law list within the definition."

"A bar association which, with substantial uniformity and without unreasonable restrictions as to type or character of practice, admits to membership members of the Bar residing within a prescribed area, and which publishes a roster or catalogue of its members, is not the publisher or issuer of a law list within contemplation of the Rules and Standards, and as such does not require the approval of the Special Committee on Law Lists of the American Bar Association for the periodic issuance and distribution of such roster if:

(1) the list contains the names of all members of the Association;

(2) no charge is made for the inclusion of a member's name in the list;

(3) in addition to the name, only such additional information is uniformly included in respect to each member as is ethically permissible;

(4) the list is distributed only to the members of the Association;

(5) no program to promote or stimulate the use of the list is engaged in, which violates the provisions of the Rules and Standards as to Law Lists, including Rule 3(d)."

The users of law lists, sometimes called the forwarders, those who use the lists to select the lawyers to whom legal business is sent, are, principally, first,

the creditor or other client who sends the business directly to the attorney without the intervention of any intermediary and, second, an intermediary, such as a collection or similar agency, an adjuster of insurance claims, or the like, to whom the client has first sent the matter for handling instead of sending it directly to the attorney.

Since law lists are instrumentalities designed to serve the source of the law business transmitted by their use and since the utility of a list depends largely upon how effectively it facilitates the selection of attorneys who render satisfactory service, the Committee has been particularly eager to ascertain and has stressed the ascertainment of the views, attitude, reaction, criticisms and suggestions of the users. To accomplish this, it has arranged for meetings to which they were invited. Very recently such meetings were held at Chicago and New York. At these meetings the utmost freedom of expression prevailed and how well or ill the public interest was being served by law lists and the lawyers listed therein, was stated with refreshing, albeit sometimes embarrassing, frankness.

A few of the questions asked, conditions described and problems presented by the users of law lists were:

(1) To whom and where are law lists distributed? For example, some law lists are distributed by their publishers, largely or exclusively, to attorneys, or to collection or similar agencies, or to adjusters, and are, apparently, withheld from the creditor and others who are likely to resort to direct forwarding. Some lists are distributed only to users located in a few of the larger metropolitan areas. Others are distributed as widely as possible to all classes of users and wherever users are located.

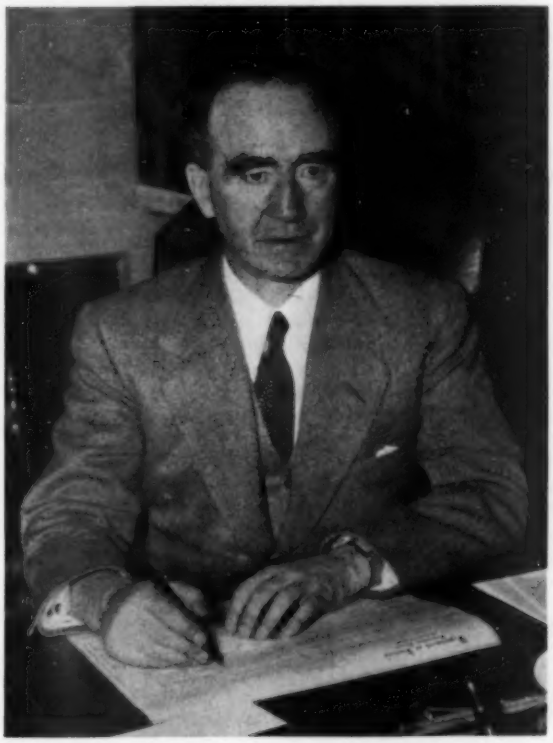
(2) Why are attorneys listed who decline to render legal services of the kind for which the list presents them? Users reported very generally, for example, that commercial lists contained the names of attorneys who refused to accept either large or small claims, who wrote that they did not handle collections, or that they did not handle "small" claims. Users told of attorneys listed in insurance lists who would not handle adjustments or anything but litigation, or plaintiff's cases, or defendant's cases, or too "small" matters. In fact it appeared that many lawyers were "choosy," to say the least, and that the lists, often, were not a very reliable instrumentality.

One of these complaints has been somewhat ameliorated by a ruling of the Committee that no attorney shall be listed without his knowledge or over his protest.

(3) Why do lists give one attorney a virtual monopoly? Users complain that too many of the commercial or specialized lists list the same lawyer, that at some points and, oftentimes, in large areas, a single lawyer only is listed. Not infrequently one attorney is listed in all of the so-called "best" lists. Frequently the lists have "assigned" to him a number of counties,—even a large part of a state. What they have said, at times, of the arbitrary and officious conduct of that lawyer is far from complimentary.

(4) Why do lists refer points to an attorney located at such a distance therefrom that he cannot possibly adequately or effectively serve it,—and, especially, when the same list sometimes lists a lawyer at a closer or more accessible point?

(5) Why are lawyers listed and why is their listing continued, when they fail, (and the publisher knows they fail), to properly perform their professional functions, or are guilty of unprofessional conduct? Included in this charge are failure to acknowledge claims, to answer correspondence, to report what has been done, to follow directions, to sue or refrain from suit as directed, to remit money collected with reasonable promptness, withholding portions of returned files and holding onto claims without performing any service whatsoever thereon. An embarrassing supplementary question was what were bar associations doing, or going to do, about these things.



HON. FRANK MURPHY

The Attorney General of the United States—Speaker at Dinner under Joint Auspices of the Section of Criminal Law and the Interstate Commission on Crime, Monday, July 10

The Committee's concern with such things arises from the provision of the Rules and Standards that "no Law List shall be approved or continue to be approved (b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs any practice not in accord with a high standard of business conduct."

The Committee's meetings with the law list users have shown them that they, at long last, have a forum for the presentation and consideration of their constructive recommendations for the improvement of law lists and the conduct of lawyers listed therein. This has changed their attitude toward the bar. What is more important, they have spontaneously and cordially tendered their whole-hearted cooperation and support of the Association's law list program.

It would be an evasion to omit reference to the ever present question, "Is it in the public interest to have so many law lists?" One might readily think that a prompt and vigorous "No" would be the only answer. But it is not.

Even if the answer were in the negative, neither the Association, nor its Committee can lawfully,—nor should it, if lawful,—prevent the publication, distribution, maintenance, or use of a law list which conforms in every respect to the Rules and Standards.

The greatest insistence that the number of lists be reduced comes from the publishers and the listees. While, probably, the users would agree that fewer lists are desirable, they are not greatly affected, interested, or vocally clamorous.

Many practical considerations have led the Committee to hesitate to conclude even that there are too many lists, or that anything but purely natural processes ever should operate to curtail them. A few of the many possible illustrations will suggest the difficulties which exist. If the number of lists is reduced, shall those few which remain be required to list all lawyers now listed in all current lists? If so, how shall the listees be divided between the lists? Suppose they all choose the so-called "best," or "better," lists? What would be the effect upon, and what the reaction of, the lawyer now enjoying exclusive, or other favorable conditions in respect of listing, if he is forced to submit to multiple listing? Suppose the remaining publishers prefer not to distribute their lists universally and a situation arises where lists are distributed only to collection agencies, or to lay adjusters, or to any other class, and direct forwarding by client to lawyer is avoided or made impossible? Would not the inevitable result be a single list with universal distribution? Would such a list have any value whatsoever to either user or listee?

In spite of the clamorous assertion that there are too many law lists,—if there are,—neither list publishers nor their listees, now enjoying advantages, are willing to "divide up" or to make the adjustments which any reduction in number of lists would require. It is greatly to be feared that the real reason for the demand is the desire to permanently confirm an existing advantage.

About a year ago the Committee sent a questionnaire to a large number of listees of each list which had then applied for approval. Much to its surprise, the support given to their particular list by its listees who responded did not differ materially.

Realizing that the coverage by means of meetings could not, immediately, be complete, the users and the listees have been requested to supply information by means of questionnaire. These inquiries, which carry out the injunction of the Rules and Standards that the Committee shall "(a) procure information regarding Law Lists and from time to time advise members of the Association thereof," include, out of a total of ten, such questions to listees as follows: (1) "Indicate the lists you expect to renew upon expiration of present contracts"; (2) "Indicate the lists which, from personal experience, are, in your opinion, under capable, dependable, and trustworthy management"; (3) "Basing your judgment on experience, indicate, in numerical order, the comparative values to the public of the lists in which your name has been or is now being published"; (4) "Indicate the lists which, from your experience, are of little or no importance in promoting the public interest"; (5) "Indicate by the letter 'd' the lists you have discontinued during the past five years because of unfair or improper practices on the part of the publisher and by the letter 'c' the lists you have discontinued because you considered their charges to be excessive and by 'o' the lists you have discontinued for any other reason"; (6) "Do you consider legal digests valuable or practical adjuncts to a list or directory?"

Twelve questions were asked of users, among which were: (1) "Indicate the list or lists regularly used by your office during the past year"; (2) "Indicate by numeral your preference among the lists so indicated"; (3) "Indicate the lists the use of which has been discontinued by your office during the past five years"; (4) "Do you consider the biographical sketch which appears in some of the law lists useful and advantageous to you in placing accounts in the hands of lawyers"; (5) "Before forwarding an account to an attorney, to what extent do you refer to the Martindale-Hubbell Law Directory for the purpose of checking his rating?"

In addition, publishers of law lists have supplied the Committee with the names and addresses of users so that the attractiveness of their law business can be determined.

The utility of the information which the Committee expects will be received in response to the ten questions asked of listees and the twelve questions asked of users is too extensive to permit thorough analysis here. Certainly enough information will be obtained to enable any lawyer, sufficiently interested to inquire, to evalue the listing he contemplates. There will be available to him the consolidated opinions of users and listees regarding a variety of matters which ought to establish the true value of the list. He will be able to decide, from information regarding the kind of business in which the users are engaged, whether he cares to receive business of the sort which such users can supply and, consequently, whether he cares to contract for a listing in a law list whose distribution is limited to such users.

The Committee has kept steadfastly before it a determination not to regiment either law list publishers or listees, and not, under any circumstances, to act as guardians or in *loco parentis* to listees. Whatever it shall accomplish, it expects to accomplish by ascertaining what is required to promote the public interest and by the fullest and frankest conferences with those who may be affected by the information so obtained. The Committee's public relations are on the soundest possible footing. Every approved law list has established its complete willingness to correct any fault which investigation has shown to exist and which the friendly conferences have shown a practical way to clear. The users of lists are avid to cooperate because an instrumentality has been provided for the elimination of their criticisms and complaints and for the improvement of the service they have found to be so necessary. The lawyer, the listee, can, finally, look forward to a basis for determining, intelligently, the value of a contemplated listing.

Finally, perhaps more in the public interest than all else, the law list problem is dealt with uniformly throughout the nation,—the only basis upon which publishers or users of the lists can conduct their businesses either practically or at all.

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

REVIEW OF RECENT SUPREME COURT DECISIONS

(*Continued from page* 598)

"the purposes which the Congress seeks to accomplish, and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the congress needs specify only so far as is "reasonably practicable."

As to the delegation to the secretary, the opinion reviews the provisions of the act and its declared purposes. It is pointed out that the declared policy "to restore parity prices" is definite and that the terms of the order are limited to specific provisions. Further discussing the act in this connection the opinion states:

"The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

"It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by Section 8c(4). ". . . . Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority.

"A further provision of the Act is to be noted as it was employed as a standard to determine the minimum price. This is Section 8c(18). Acting under this section, the Secretary fixed a fluctuating minimum price based upon wholesale butter prices in New York. While it is true that the determination of price under this section has a less definite standard than the parity tests of Sections 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and Section 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary."

As to the delegation of power to producers to make the order effective on referendum even though 50% of the handlers fail to approve, the opinion states:

" . . . In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation."

The objection based on delegation to cooperatives of power to cast the votes of producer patrons is similarly disposed of.

One of the defendants had denied liability to pay its net pool obligation into the administrative fund or to meet the expenses of administration because it is a cooperative composed of producers, and distribute the milk of its members and others as agents under an "agency" rather than a "sale" type contract with its members, and because section 8c (5) A of the Act speaks only of handlers who "purchase" milk from producers.

After a summary of the provisions of the act relating to this point, the opinion concludes:

". . . The section which authorizes all orders, Section 8c(1), makes no distinction. The orders are to be applicable to 'processors, associations of producers, and others engaged in the handling' of commodities. The reports on the bill show no effort to differentiate. Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of 'agency' cooperatives. The administrative construction has been to include such organizations as handlers. With this we agree. As here used the word 'purchased' means 'acquired for marketing.' Subsection (A) cannot be construed as freeing agents, cooperative or proprietary, from the requirement to account at the minimum prices for milk handled."

It was further urged by this cooperative that section 8c (5) F of the Act, which provides that nothing in that subsection is to prevent cooperatives from making distribution to "its producers in accordance with the contract" must be construed to prevent any requirement that cooperatives pay their surplus receipts over uniform prices into the equalization fund. The opinion finds that such a construction of the act is not required and points out that exemption of cooperative members from the burden of carrying their proportion of milk going into manufactured use would cause marked discrimination.

The cooperatives' final point that the provision of the order which authorizes a handler to subtract pro rata out of each class from the milk involved in the pool the quantity received from the handlers own farm, would obviate any requirement to contribute to equalization, since its members, all farmers, would not need to account to the pool for their personal sales to consumers, and the cooperative is only their agent. The opinion disposes of this by noting that the cooperative does not have its own farm but is itself a handler under the act.

Finally the opinion concludes that inasmuch as all the defendants are handlers of milk in interstate commerce, the petition to enforce the order of the New York Commissioner of Agriculture and Markets as to milk not covered by the Federal order, should be dismissed. The causes were reversed and remanded to the district court with instructions to enter an order specifically enforcing the Federal Order up to the time of its suspension as to all defendants, and enjoining further violations by them.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concurred in the majority opinion except insofar as it appeared to imply that Congressional power to enact the marketing law depended upon the use and nature of milk. They did not believe that any indication of such a limitation on the power of Congress to regulate interstate commerce was called for in this case.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented. Their opinion states that the order is invalid for two reasons. First because of Congressional lack of power under the guise of regulating interstate commerce to manage private business affairs and, second, because even if Congress did possess power to manage the milk business in the various states, the statute delegates such power to the Secretary of Agriculture as to invalidate it.

MR. JUSTICE ROBERTS also delivered a dissenting opinion. It was his view that aside from the question of unconstitutional delegation of power, the provisions of the order which permit handlers of both milk which is marketed outside the marketing area ("unpriced" milk) and which does not figure in the computation of the uniform price, and milk to be sold in the marketing area, to blend the price paid or purported to be paid for "unpriced" milk with the uniform price fixed for milk sold in the marketing area, are not authorized by the act and, if they are authorized, are an unconstitutional discrimination against handlers who deal only in uniform price milk.

He reviews the district court findings on this point, and points out that they are supported in the record by uncontradicted testimony, documentary evidence, and stipulations of the parties. His view is expressed in the following paragraphs from his opinion.

"It is evident from the terms of the order, and the Secretary's construction of it, that handlers who use 'unpriced' milk may fix any price they choose to fix for it. Thus, contrary to the requirement of Section 8c(5) (A), of the statute, all producers do not receive a uniform price for milk. This is a necessary effect of the provision permitting the blending of the price paid producers for milk sold in the marketing area and an arbitrary price fixed for 'unpriced' milk. The effect upon a handler whose trade is solely in the marketing area is disastrous. The lower price paid by those who are permitted to blend makes it possible for them to resell the milk in the marketing area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business. And there is evidence that handlers, cooperative and proprietary, have taken advantage of the terms of the order to cut the price of milk to consumers in the marketing area to the disadvantage of their competitors."

"The appellants make no answer to the appellees' attack on this feature of the order. The opinion of this court states that the detriment to the smaller handlers who sell milk for use only in the marketing area is the result of competitive conditions which the order does not affect. But it is evident that the order freezes the minimum price which is to be paid by many handlers and leaves the price of other handlers who compete with them open to reduction by the device of blending.

"There is nothing in the Act which authorizes the discrimination worked by the order permitting handlers, whether proprietary or cooperative, to blend the prices of unpriced milk with that of milk, sold in the marketing area. Section 8c(5) (F), as I read it, prohibits such a practice by cooperatives. If the order had provided that milk sold in New Jersey should be accounted for to the pool at its actual value and had the milk so sold been accounted into the pool, competitors could not have obtained the advantage which so seriously injures the business of appellees. As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law."

THE CHIEF JUSTICE joined in MR. JUSTICE ROBERT'S dissent in so far as it related to the invalidity of the order on the ground stated, and MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER also joined in JUSTICE ROBERT'S opinion.

The cases were argued on April 24th and 25th, 1939, by Mr. Solicitor General Jackson for appellants; by Mr. Leonard Acker for Central New York Cooperative Assn., Inc.; by Mr. Willard R. Pratt for Rock Royal Co-operative, Inc., et al.

H. P. Hood and Sons, Inc., and Noble's Milk Company v. United States and Henry A. Wallace; Whiting Milk Co. v. Same; E. Frank Brennon v. Same. 83 Adv. Op. 1011; 59 Sup. Ct. Rep. 1019.

This opinion also involved the constitutionality of the Agricultural Marketing Agreements Act of 1937 and of an order of the Secretary of Agriculture regulating the handling of milk. The order here related to milk in the greater Boston, Massachusetts Marketing area.

The actions were originated in the district court to compel two defendant milk companies to comply with order No. 4 of the Secretary of Agriculture, as amended. A temporary mandatory injunction was issued, and, after reference to and report by a special master, a final decree was entered for the United States. Certiorari was granted by the Supreme Court pending appeal to the Circuit Court of Appeals, because important undecided questions of Federal law were involved, and other cases involving similar issues were ready for argument.

The Secretary's amended order No. 4 which was challenged, was similar to the New York order involved in the *Rock Royal Cooperative case.* It fixed minimum prices for milk to be paid producers by handlers in the Boston area, and its adoption was preceded by a similar course of events. However, here the original order had been first issued in 1936 under the Agricultural Adjustment Act, and was suspended when that act was declared unconstitutional by the district court. It was amended and repromulgated after new hearings and a referendum of producers, under the Agricultural Marketing Agreements Act in 1937.

In this case, as in the *Rock Royal Cooperative case,* the opinion of the Court was given by MR. JUSTICE REED. Here, too, the constitutionality of the Act and of the order were challenged, and on similar grounds. The opinion does not rediscuss these issues at length, but it merely notes that what was said in the *Rock Royal* opinion is determinative of similar contentions in this case.

It was urged that order No. 4, as amended, was defective in that it was not preceded by an essential finding and proclamation required by the Act. The amended order used a post war period as a base to determine prices. This was the same base that had been used to determine prices under the original 1936 order. When the original order was promulgated, a finding and proclamation of the absence of pre war period statistics, normally to be used in determining prices, was made by the Secretary as required by section 8e of the Act. The amended order was not so preceded. It was argued that, under section 8c (17) amendments to orders must also be preceded by the finding and proclamation. The Court rejects this argument in the following paragraph taken from the opinion:

"Ordinarily the base period of Section 2 is to be used. It is only after a finding that the purchasing power of the commodity during the period fixed in Section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture that the Secretary by Section 8e is authorized to find and proclaim the post-war base period. By Section 8c(1) the Secretary is authorized to issue 'and from time to time amend' orders. Obviously, as a general clause to make all the provisions of sections 8c, 8d and 8e applicable to amendments, Section 8c(17) was adopted. Without it questions would have been pertinent as to the applicability to amended orders of various provisions in these sections. Doubt would arise as to the power to change the base period after it was once determined. There would seem to be no occasion to review the absence of satisfactory statistics, however, on a proposed amendment which does not involve any change in the base

period. The requirement for finding and proclamation in adopting a base period is not intended to force the Secretary to go through a meaningless ritual. A determination of the necessity of using the post-war base period once made and proclaimed satisfies the conditions of sections 8c(17) and 8e for amendments, so long as no amendment is made which involves a change in the base period. This has been the administrative construction where amendments have been made to orders which had utilized a post-war base period. The plaintiffs show this by a series of references to the Federal Register which are not challenged."

The validity of the referendum of producers which preceded the order was challenged for several reasons:

"(1) A large number of southern and western producers who delivered to stations shipping cream were not permitted to vote. (2) Many New England or Eastern New York producers voted who delivered to handlers at plants which shipped only cream in the representative period. (3) Many voted who produced milk on farms as to which no certificate of registration had been issued, as required by Sections 16A and 16C of the Massachusetts milk law. (4) A number of approving producers delivered milk to stations which shipped less than 50 per cent of their product to the Boston area. (5) Cooperatives cast votes in favor of the amendments to the Order solely through ballots cast by their boards of directors. Inclusion of the southern and western shippers of cream or elimination of any one of the remaining groups might have changed the result of the referendum."

The opinion answers these objections generally with the conclusion that the court is of opinion that the secretary has followed the statute. This underlying view is expressed in the following language:

"The Act does not supply the Secretary with detailed directions as to the manner of holding a referendum. Its language is general. The Secretary 'may conduct a referendum among producers.' What producers? Those 'engaged in the production of [milk] for sale in the marketing area. . . .' Every producer who voted was so engaged. Each delivered milk to the plant of a handler licensed to distribute and sell fluid milk in the marketing area. The Order is aimed at the handling of milk marketed in the area. The problems to be solved are those engendered by the necessary, yet troublesome, surplus of fluid milk. Every handler to whom the voters delivered contributed to that surplus."

The decree of the district court had directed the defendants to pay to the market administrator for distribution to the producers through the equalization fund the amounts which he had billed them under the order. Defendants contended that the bills violated the terms of the order, because they included in their computation, milk excluded by its terms. The opinion points out in come detail the reasons why it considers this contention to be without merit.

Finally, it was argued that the Secretary had failed to make a required finding that reinstatement of the original order would tend to effectuate the policy of the Act. Without deciding whether such a finding is essential, the court concluded that a subsequent finding to that effect, made when the amendments to the order were adopted and promulgated had cured the defect.

The Decree of the District Court was therefore affirmed.

MR. JUSTICE ROBERTS delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER joined. The opinion states the view that it is unnecessary to consider whether the order complied with the terms of the Act, or whether the act or order deprived Appellees of property without Due Process, since, in any event, the Act unconstitutionally delegates legislative power to the Secretary of Agriculture. The fundamental reasons leading to this view are found in the following excerpt from the dissenting opinion:

"Valid delegation is limited to the execution of a law. If power is delegated to make a law, or to refrain from making it, or to determine what the law shall command or prohibit, the delegation ignores and transgresses the Constitutional division of power between the legislative and the executive branches of the government.

"In my view the Act vests in the Secretary authority to determine, first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of regulation, and, fourth, the character of regulation to be imposed and, for these reasons, cannot be sustained.

"The statute is an attempted delegation to an executive officer of authority to impose regulations within supposed limits and according to supposed standards so vague as in effect to invest him with uncontrolled power of legislation. Congress has not directed that the marketing of milk shall be regulated. Congress has not directed that regulation shall be imposed throughout the United States or in any specified portion thereof. It has left the choice of both locations and areas to the Secretary. Congress has not provided that regulation anywhere shall become effective at any specified date, or remain effective for any specified period. Congress has permitted such a variety of forms of regulation as to invest the Secretary with a choice of discrete systems each having the characteristics of an independent and complete statute. . . .

". . . Where delegation has been sustained the court has been careful to point out the circumstances which made it possible to prescribe a standard by which administrative action was confined and directed. Such a standard, as respects milk marketing, is lacking in the Agricultural Marketing Agreement Act of 1937."

The cases were argued on April 25 and 26 by Mr. Charles B. Rugg for H. P. Hood and Sons and Brennon and by Mr. John M. Raymond for Whiting Milk Co., and by Mr. Solicitor General Jackson for the United States and Henry A. Wallace.

Costs—Special Allowances in Equity—Terms of Court

When one of the parties to a litigation establishes a lien or right to equitable relief, which benefits other parties similarly situated, a court may order that expenses incurred in the litigation be reimbursed out of the fund available.

A petition for the reimbursement of disbursements under such circumstances is an independent proceeding supplemental to the original proceeding and not affected by the passage of the term at which the original decree was entered.

Sprague v. Ticonic National Bank, 83 Adv. Op. 771; 59 Sup. Ct. Rep. 777. Certiorari to the Circuit Court of Appeals, First Circuit.

Lottie F. Sprague deposited in the Ticonic National Bank of Waterville, Maine, (hereafter called "Ticonic") moneys in which she and others had beneficial interests. Ticonic secured this and other trust funds by a pledge of bonds set aside in its trust department as required by Section 11 (k) of the amended Federal Reserve Act. Soon after the deposit the Peoples National Bank took over all the assets of the Ticonic and assumed its liabilities. Six months later the Peoples Bank closed and both banks went into the hands of a receiver. In due time the beneficiaries filed a bill in a district court, to impress upon the proceeds of the bonds a lien for their trust deposit. The district court sustained the claim and ordered the lien dis-

charged with interest from the date of the filing of the bill and payment of taxable costs. On appeal the Circuit Court first disallowed interest but on re-hearing affirmed the decree of the district court "with costs." The Supreme Court granted certiorari "limited to the question as to the allowance of interest." Before its disposition petitioner Sprague filed a petition in the district court which set forth that in vindicating her claim to a lien on the proceeds of the ear-marked bonds she had established as a matter of law a right to recovery in relation to fourteen trusts in situations like her own and therefore prayed the court for reasonable counsel fees and litigation expense to be paid out of the proceeds of the bonds. The district court dismissed that petition and held it had no authority to grant the petition on the ground that after the appeal from its decree it "had no further function to perform other than to carry out the mandate of the Supreme Court when received," and the Circuit Court affirmed for the reasons stated by the district court and for the further reason that the term at which the decree was entered had long since passed when the petition was filed.

The court speaking by MR. JUSTICE FRANKFURTER said:

"Whether action by the District Court on the merits of the petition was foreclosed by this Court's mandate in *Ticonic Bank* v. *Sprague, supra,* and was further limited by restrictions which terms of court may impose, are questions subsidiary to the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute.

"Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, *e.g., Michaelson* v. *United States,* 266 U. S. 42. The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party,' but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client.' To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for a group though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis,* the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds."

It was declared that while the distinctions above referred to were sometimes of controlling importance they seemed not to be a differentiating factor in a case of this sort; that the historic practice of granting reimbursements for the cost of litigation other than the conventional taxable costs, has always been a part of the original authority of the chancellor to do equity in a particular situation. Emphasis was given to this view by the following statement:

"As in much else that pertains to equitable jusisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation. And so, the circumstances under which the petitioner enforced the fiduciary obligation of the Ticonic Bank—the relation of its vindication to beneficiaries similarly situated but not actually before the court, as well as the interest of the common creditors where the funds of the bank are not sufficient to pay them in full, and doubtless other considerations—must enter into the ultimate judgment of the District Court as to the fairness of making an award, or the extent of such award, 'as between solicitor and client' in this case. In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice. But here we are concerned solely with the power to entertain such a petition."

Attention was called to the fact that the district court had not taken into consideration the historic power of a court of equity in such matters but had deemed itself powerless to act upon the petition because foreclosed by the mandate in a prior litigation. In that litigation the court declared that no action has been taken upon the petitioner's claim for reimbursement of these costs "as between solicitor and client" and that therefore the mandate was no bar to the disposal of the petition on its merits.

The Circuit Court of Appeals relied upon the separate ground that after the passage of the term of court the district court was without power to act upon the petition. On this point the court said:

"The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity, but the ruling of the District Court here in question was made prior to the operation of the new Rules. Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late—falls."

The decision of the Circuit Court of Appeals was therefore reversed so that the district court might entertain the petition for reimbursement in the light of the appropriate equitable considerations.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred in the result.

MR. JUSTICE DOUGLAS took no part in the decision.

The case was argued by Mr. Harvey D. Eaton for petitioner and by Mr. George P. Barse for respondents.

Citizenship—Status of Native-Born Citizen Born of Foreign Parents Upon Removal to a Foreign Country

Under the provisions of the Fourteenth Amendment and the Civil Rights Act of 1866 a person born of foreign-born parents in the United States is a citizen of the United States. In the absence of statute or treaty otherwise providing, the removal of such person to a foreign country by the parents during the child's minority and the resumption of their original citizenship by the parents do not deprive the child of the right to elect to retain American citizenship, upon attaining majority. Voluntary renunciation of citizenship will not be attributed to a minor.

No statute or treaty provision has altered this rule in its application to a person born here of Swedish parents.

Perkins et al. v. Elg, 83 Adv. Op. 895; 59 Sup. Ct. Rep. 884.

The respondent's citizenship was questioned in this case. She was born in New York, in 1907, of Swedish parents. Her father was naturalized here in 1906. In

1911 her mother took the respondent to Sweden where she continued to reside until September, 1929. The father returned to Sweden in 1922 and voluntarily expatriated himself in 1934. In 1928, shortly before reaching the age of 21, the respondent made inquiry of the American consul about returning to the United States, and was informed if she returned after attaining her majority she should seek an American passport. In 1929, within eight months after attaining majority, she obtained an American passport which was issued on instructions of the Secretary of State, returned to the United States, was admitted as a citizen, and has resided here since. In 1935, the respondent was notified by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. In 1936 she applied for an American passport which the Secretary of State refused solely on the ground that she was not a citizen of the United States.

The respondent then brought suit against the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State to obtain (1) a declaratory judgment of her American citizenship, (2) an injunction against deportation, and (3) an injunction against the Secretary of State from refusing to issue her a passport upon the ground of her non-citizenship.

The defendants moved to dismiss the complaint, asserting that the respondent was not a citizen by virtue of the Naturalization Convention and Protocol of 1869 between this country and Sweden, and the Swedish Nationality Law, and the Act of Congress of March 2, 1907. The District Court overruled the motion as to the Secretary of Labor and the Commissioner of Immigration, and entered a decree declaring that the respondent was a native citizen. That court directed that the complaint be dismissed as to the Secretary of State because of his official discretion in the issuance of passports. The Circuit Court of Appeals affirmed. On certiorari the decree was modified by the Supreme Court, so far as it dismissed the bill of complaint as to the Secretary of State, and was affirmed as so modified. The Chief Justice delivered the opinion of the Court.

He points out first that the respondent became a citizen of the United States by reason of her birth in New York, under the Civil Rights Act of 1886 and under Section 1 of the Fourteenth Amendment to the Constitution. He observes, secondly, that it is a well-settled principle that if a child born here is taken, during minority, to the country of the parents' origin where the parents resume their citizenship, the child does not thereby lose American citizenship if, upon attainment of majority, the child elects to retain that citizenship and returns to the United States to resume the duties of citizenship there; and that voluntary expatriation is not to be attributed to an infant during minority. In this connection, after citing various administrative rulings in support of the principle, MR. CHIEF JUSTICE HUGHES says:

"We think that they leave no doubt of the controlling principle long recognized by this Government. That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.

"Petitioners stress the American doctrine relating to expatriation. By the Act of July 27, 1868, Congress declared that 'the right of expatriation is a natural and inherent right of all people.' Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Attention is then turned to the question whether the right of election has been destroyed by treaty or statute.

Under this heading, the Government contended that in the circumstances the respondent has lost her American citizenship by reason of our Treaty of 1869 with Sweden. But the Court points out that that treaty deals with voluntary residence by a naturalized citizen in the country of his origin, and does not mention minor children who obtain citizenship here by birth and, during their minority, are taken by their parents to another country.

The Government also relied upon Section 2 of the Act of March 2, 1907. Section 2 of that Act provides:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war."

The Government's contention under this provision was that the respondent's acquisition of derivative Swedish citizenship made her a person "naturalized under Swedish law," and that consequently "she has lost her American citizenship" by virtue of the statute. Rejecting this contention, the Court says:

"We are unable to accept that view. We think that the statute was aimed at a voluntary expatriation and we find no evidence in its terms that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose. If by virtue of derivation from the citizenship of one's parents a child in that situation can be deemed to have been naturalized under the foreign law, still we think in the absence of any provision to the contrary that such naturalization would not destroy the right of election."

Instructions of the Department of State issued in 1923 are cited in support of this conclusion. It is noted that subsequent to the instructions a change of opinion occurred in the administrative branch of the

Government. However, the Court adheres to the earlier view which the Department of State took regarding the question and concludes that respondent has not lost her American citizenship.

Finally, the Court considers the question whether the respondent's suit should be dismissed as against the Secretary of State. In view of the fact that his refusal to grant a passport was based solely upon the ground that respondent had lost her native-born American citizenship, the Court expresses the opinion that the complaint should not be dismissed as to the Secretary of State. It is mentioned, however, that the decree would not interfere with the exercise of the Secretary's discretion as to the issue of a passport, but would merely preclude denial of the passport by reason of the supposed loss of citizenship.

MR. JUSTICE DOUGLAS took no part in the decision of the case.

The case was argued by Mr. Solicitor General Jackson for the Government, and by Mr. Henry F. Butler for Miss Elg.

Carriers—Recovery of Reparation Paid Under Order of Interstate Commerce Commission Where Order is Later Set Aside

An order of the Interstate Commerce Commission directing a carrier to pay reparation to a shipper on account of the exaction of unreasonable rates is subject to the Commission's power to set it aside or modify it. Reparation paid in compliance with an order holding rates unreasonable is not a voluntary payment by the carrier, and upon the setting aside of the order by the Commission and the entry of a new order re-establishing the old rates as reasonable the carrier is entitled to recover amounts of reparation paid.

Baldwin and Thompson, Trustees of Mo. Pac. R. R. Co. v. Scott County Milling Co., 83 Adv. Op. 970; 59 Sup. Ct. Rep. 943.

The respondent and others complained to the Interstate Commerce Commission that the rates on coal were excessive. The Commission found that the rates were unreasonable, prescribed reasonable rates for the future and awarded reparation. The Missouri Pacific paid reparation of $23,994 on April 20, 1929. Later the Commission reopened the case and in July, 1933, set aside its previous orders, including the reparation orders on which respondent had collected.

October 30, 1934, petitioners demanded refund by the respondent of the amount paid as reparation and on refusal of the demand, sued to recover in a circuit court of Missouri. That court held for respondent, and its decision was affirmed by the Supreme Court of Missouri. On certiorari, the Supreme Court reversed, in an opinion by MR. JUSTICE BUTLER.

MR. JUSTICE BUTLER first cites the rule that in the absence of a finding by the Commission that tariff charges collected for interstate transportation are unreasonable, there is no claim for damages caused by exactions covered by the tariff, but that when the Commission made its reparation order the carriers, in the absence of facts constituting a defense, were bound to pay in accordance with the order.

The provisions of Sec. 16 (1) and (2) are cited as indicative of the intent of the Act to prevent the interposition by the carriers of defenses lacking in merit. Section 16a is also cited, which empowers the Commission to set aside and modify its own orders, but also provides that an application for rehearing to set aside or modify an order shall not relieve the carrier from the duty of compliance with an order without a special order of the Commission.

Since the respondent here collected under a reparation order which was made subject to the Commission's power to modify it or set it aside, and since the order was set aside, and the original rate charged by the carrier was finally found reasonable, there is no basis on which the respondent was entitled to retain what it had then collected. On the contrary, to permit it to retain such sum would run counter to the policy and provisions of the Interstate Commerce Act. Concerning this, MR. JUSTICE BUTLER says:

"The clauses of §16a that authorize the commission to consider facts arising after the former hearing and that make its decisions after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. §6(7); see also §10(2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See §10(3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. . . . By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

"The retention by respondent of money collected under the findings and order that the commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act."

In conclusion, the opinion refers to the respondent's contention that it would be inequitable to require it to refund the amount collected, because it had employed an expert to assist it in its case before the Commission on a contingent fee basis; had paid him one-half of the amount recovered as reparation; that it was barred by limitations from recovering the fee so paid; and finally that it had used the other half to pay dividends and for other corporate purposes. Rejecting this argument, the Court states:

"As above indicated, the court held the payment to be voluntary and rested its ruling on that fact. But as shown above it was not voluntary; it was demanded by respondent and compelled by the Act, findings, and reparation order. Moreover, equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges."

The case was argued by Mr. H. H. Larimore for the petitioners, and by Mr. James A. Finch for the respondent.

Carriers—Transportation Under Government Land-Grant Aid Contract—Alternate Routes

Southern Pacific Co. v. United States, 83 Adv. Op. 908; 59 Sup. Ct. Rep. 923; (No. 613, decided May 29, 1939).

Certiorari to review a judgment of the Court of Claims sustaining the Government's defense to an action by the railroad to recover additional amounts claimed by the carrier to be due on Government freight shipped over railroad mileage constructed with Government land-grant aid.

The carrier has two alternate routes for transportation between the points of origin and destination. Some 42% of the older route is land-grant mileage, while the newer route involves but about 17% of land-

grant mileage. The rates over the newer route are lower than over the earlier route, by reason of revisions to meet water competition. But the Government gave no specific directions as to which route should be used.

The Court of Claims sustained the Government's contention that it was entitled, under the land-grant contract, to the lower rate less land-grant deductions based on the original route. The Supreme Court affirmed the judgment of the Court of Claims in an opinion by MR. JUSTICE REED.

MR. JUSTICE BUTLER delivered a dissent, concurred in by MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

The case was argued by Mr. James R. Bell for the railroad and by Mr. Assistant Attorney General Whitaker for the Government.

Public Utilities—Power of Commission to Regulate Rates

American Toll Bridge Co. v. Railroad Comm. of Calif., et al., 83 Adv. Op. 975; 59 Sup. Ct. Rep. 948. (No. 704, decided June 5, 1939.)

Appeal to review a judgment of the Supreme Court of California upholding an order of the State Railroad Commission reducing bridge tolls on the appellant's bridge across Carquinez Straits between Contra Costa and Solano counties.

The appellant contended that the Commission's order was in violation of the contract clause of the Constitution and of the due process clause of the Fourteenth Amendment because of irregular procedure and also in violation of the same clause because the rates prescribed were confiscatory. In an opinion by Mr. Justice Butler, the Supreme Court affirmed the decree of the state court sustaining the order.

In reaching this conclusion, the Court examines statutory provisions urged by the appellant as establishing a contract right under its franchise whereby the bridge tolls may not be reduced by public authorities unless it is first made to appear that the tolls are yielding a rate in excess of 15% upon the rate base. The Court analyzes the statutory provisions relied upon and concludes that they negative the appellant's claim.

Attention was also given to appellant's claim that there had been a violation of procedural due process. The arguments urged by appellant in this connection are examined by the Court and found to be without merit.

On the issue of confiscation, the Court emphasizes that the order changed the tolls only as to automobiles and passengers, but made no change as to tolls applicable to other classes of traffic, such as bicycles, carts, wagons, trucks, commercial or delivery automobiles, ditchers, harvesters, cattle and stock and motor stages, or as to freight, hearses, horses, motorcycles and trailers. In rejecting appellant's contention on this point, the Court emphasizes that the appellant failed to establish by allocation or apportionment to the traffic affected by reduced tolls the operating expenses, depreciation, taxes and various other charges, and also failed to establish the amount of property value justly attributable to traffic covered by reduced rates.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS concurred in the result.

The case was argued by Mr. Max Thelen for the appellant, and by Mr. Ira H. Rowell for the appellee.

Patents—Invalidity for Want of Invention

Toledo Pressed Steel Co. v. Standard Parts, Inc., etc., 83 Adv. Op. 885; 59 Sup. Ct. Rep. 897. (Nos. 166, 167, 603, decided May 29, 1939.)

Certiorari to review three cases involving the validity of Withrow & Close Patent No. 1,732,708, issued October 22, 1929, for a burner for use in outdoor warning signals such as construction torches and truck flares.

In two cases, Nos. 166 and 167, arising in the Sixth Circuit, the district court held the patent valid and infringed, and the Circuit Court of Appeals reversed. In No. 603, in the Second Circuit, the district court held the patent invalid and dismissed, and the Circuit Court of Appeals reversed.

On certiorari the Supreme Court, in an opinion by MR. JUSTICE BUTLER, reversed in No. 603, holding the patent invalid for want of invention. Earlier patents are cited as relevant to the issue of invention, and the device here involved is examined in the light of the earlier patents. It is pointed out that the problem which the patentees faced was the prevention of extinguishment of the flame while preserving its usefulness as a warning signal. This they solved by bringing together a type of torch and a kind of cap previously in use. "As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion, to protect the flame from wind and rain and to allow it to emerge as a warning signal. They performed no joint function. Each served as separately it had done. The patented device results from mere aggregation of two old devices, and not from invention or discovery."

The decrees in Nos. 166 and 167 were affirmed.

The case was argued by Mr. Samuel E. Darby, Jr., and Mr. Wilbur Owen for the Steel Company, and by Mr. W. P. Bair for respondents in No. 166 and No. 167, and Mr. Carl V. Wisner, Jr., for petitioner in No. 603.

Fifteenth Amendment—"Grandfather Clauses"

Lane v. Wilson et al., 83 Adv. Op. 826; 59 Sup. St. Rep. 872. (No. 460, decided May 22, 1939).

Certiorari to determine the constitutionality under the Fifteenth Amendment of electoral legislation of Oklahoma, which provided that persons who had voted at a certain election held under a "grandfather clause" which the Supreme Court had subsequently held invalid as a violation of the 15th amendment might automatically remain qualified voters, while all others were required to apply for registration within a twelve day period in order to be entitled to vote. This action was brought by a colored citizen of Oklahoma who was qualified to register during the 12-day period but failed to get on the register at that time against election officials for declining to register him after the specified time.

The Court's opinion by MR. JUSTICE FRANKFURTER first examines and rejects contentions of the defendants that the plaintiff has no standing to maintain the action and that Federal jurisdiction may not be invoked since the State procedure is adequate. It then examines the constitutional question and concludes that the legislation partakes too much of the infirmity of the previously invalidated "grandfather clause" and therefore violates the Fifteenth Amendment.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented.

MR. JUSTICE DOUGLAS did not participate.

The case was argued on March 3, 1939 by Messrs. Charles A. Chandler and James M. Nabrit, Jr., for the petitioner and by Mr. Charles G. Watts and Mr. Joseph C. Stone for the respondents.

Patents—Appellate Jurisdiction

Electrical Fittings Corporation et. al. v. Thomas & Betts Co. et al., 83 Adv. Op. 861; 59 Sup. Ct. Rep. 860. (No. 582, decided May 22, 1939).

Certiorari to review Circuit Court dismissal of an appeal from a District Court decree holding a certain patent claim to be valid, but dismissing the bill for failure of proof of infringement. The appeal was taken by the plaintiff below from so much of the decree as adjudicated the claim to be valid, and the Circuit Court had dismissed the Appeal on the ground that, since the litigation had terminated in appellants favor, the court could give him no further relief.

The Supreme Court's opinion by MR. JUSTICE ROBERTS holds that the appellant was entitled to have that part of the decree adjudging the validity of the claim eliminated, and that the Circuit Court had jurisdiction to entertain the appeal to reform the decree in that respect.

The case was argued on April 19, 1939 by Mr. Samuel E. Darby, Jr., for the petitioners, and by Mr. George Whitefield Betts, Jr., for the respondents.

Patents—Disclaimer

Maytag Company v. Hurley Machine Co. and Electric Household Utilities Corp.; Maytag Company v. Easy Washing Machine Corp; and *General Electric Supply Corp. v. Maytag Company*, 83 Adv. Op. 862; 59 Sup. Ct. Rep. 857. (Nos. 76, 77 and 661, decided May 22, 1939).

Certiorari involving the validity of a patent containing 39 claims, 36 of which are for a washing machine, and 3 of which are for a method of washing fabrics. In a previous suit, 2 of the apparatus claims and one of the method claims had been held invalid for want of novelty, and thereupon the company disclaimed two of its method claims, including the one held invalid in the previous suit, but not the third, which had not been in suit in the previous case or this case and had not been made the basis of any other suit.

The Court's opinion by MR. JUSTICE ROBERTS holds that since the method claim which was not disclaimed describes the same method as that involved in one of the claims that was disclaimed, failure either to sue upon it, or to disclaim it, invalidates the entire patent. Under Revised Statutes §§ 4917 and 4922.

The case was argued on April 19 and 20, 1939 by Mr. Wallace R. Lane for Maytag Company and by Mr. William H. Davis for Hurley Machine Co. and Electric Household Utilities Corporation, Easy Washing Machine Corporation and General Electric Supply Corporation.

Contract Clause—Municipalities—Public Officers

Higginbotham v. *City of Baton Rouge*, 83 Adv. Op. 658, 59 Sup. Ct. Rep. 705. (No. 462, Decided April 17, 1939).

Appeal from Louisiana Supreme Court involving the constitutionality under the contract clause of Article I, section 10, of the Constitution, of legislation of the State of Louisiana and the city of Baton Rouge by which the office of commissioner of public parks in the City Commission form of government was abolished and a new office of Superintendent of Public Parks and Streets, subject to the mayor was substituted. The legislation provided that petitioner, the incumbent of the commissioner's office, should be entitled to enter the employ of the city at a salary equal to that he had received as commissioner, and to continue there during good behavior until the next general election. The petitioner's term as commissioner would have expired at that election. He was given the newly created Superintendent's office but by later legislation before the next general election, that office was abolished and petitioner's employment in that capacity was terminated.

The Court's opinion by MR. CHIEF JUSTICE HUGHES finds that there is no reason for disagreeing with the state court's conclusion that the legislation is not in conflict with the contract clause of the Constitution; that the petitioner's duties as Superintendent were similar to those as Commissioner and related to ordinary governmental functions of the city and that the office was, therefore, subject to the control of the legislature.

The case was argued on March 3, 1939, by Mr. Paul G. Borron for the appellant.

Federal District Court—Jurisdiction—State Statutes—Injunctions

Kohn, et al v. *Central Distributing Co., et al*, 83 Adv. Op. 656, 59 Sup. Ct. Rep. 689. (No. 177, decided April 17, 1939.)

Appeal from three judge court judgment dismissing a bill to enjoin the enforcement of the Kentucky Alcohol Control Act, Beverage Tax Act and Beverage Control Law as in violation of the Federal Constitution. The complainant was in possession, under mortgage default of its owner, of certain whiskey which had been attached by state tax collection officers in proceedings in the state court to collect the taxes levied against the owner under the acts in question.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the Federal action was properly dismissed since it runs counter to section 265 of the Judicial Code forbidding injunctions to stay state court proceedings and to the Act of August 21, 1937, forbidding suits to enjoin, suspend, or restrain the assessment, levy, or collection of taxes imposed by state law where a plain, speedy, and efficient remedy is available in the state courts.

The case was argued on March 1st and 2nd, 1939, by Mr. Harvey H. Smith for appellants and by Mr. J. J. Leary for appellees.

DECISIONS ON FEDERAL RULES

(*Continued from page* 583)

Court, if a claim for copyright infringement is joined with a claim for accounting under a contract, the new Rules, including those relating to discovery, are applicable to the latter claim. (Rules 26 (a) and 45 (b)).

RULE 83—Rules by District Courts

Ernest Cavicchi v. Mohawk Manufacturing Co., Inc. (Southern District of New York, LEIBELL, D. J., May 26, 1939).

Under the power of each district court to make rules not inconsistent with the Federal Rules, non-resident parties may be required to furnish security for costs.

REPORTS OF SECTIONS AND COMMITTEES

BY action of the Board of Governors upon the recommendation of the Administrative Committee on Printing, Publication and Indexing, the reports of Sections and of Association Committees which do not contain recommendations requiring the action of the San Francisco meeting are being summarized in the JOURNAL, *with appropriate excerpts where warranted. The first installment of these summaries was published in the June* JOURNAL. *The Advance Program pamphlet containing the reports which made recommendations for action was mailed to all members of the Association about June 15th, and thus enabled Association members to give their attention to the matters to be voted on at the Annual Meeting. The informative reports which do not contain recommendations for action and which have been summarized for the June, July and August issues of the* JOURNAL, *will be printed in full in pamphlet form for the San Francisco meeting, and will be sent to all Association members in the 1939 Annual Report Volume, which will be printed and distributed as soon as practicable after the adjournment of the Annual Meeting.*

The second installment of these summaries and excerpts is given as follows:

Report of the Standing Committee on Labor, Employment and Social Security

This Committee in a vital and highly controversial field submits no new recommendations for action at the San Francisco meeting. The majority of the Committee stand on its recommendations as approved by the House of Delegates last January (JOURNAL for February, 1939, pages 85, 103-105, 119-127, 162-163). A minority of the Committee renews their dissent from the approved recommendations as to the National Labor Relations Act, some of which have already been given *interim* effect by judicial decisions and action of the National Labor Relations Board.

The present report reviews the legislative situation, and some of the judicial decisions, to date respecting its comprehensive recommendations covering the Wages and Hours Act, the Social Security Act, the Labor Relations Act, and other matters in its field. Concerning the simplification of statistics and reports under the numerous labor laws, the report says that:

"Your Committee again calls attention to the urgent need for standardization and simplification of the very numerous report forms and specifications for statistical data, etc., which are called for under the National and State laws affecting labor, employment and social security. Minor and avoidable variances in these forms and specifications impose heavy burdens on employers, particularly small businesses which need to be relieved from costly and unproductive 'paper work.'

"In recent months, there is an increased awareness of this situation and of the need for practical steps to reduce the avoidable costs in making reports to the numerous agencies. There can be no occasion for variant bases of data covering the same employments and operations. Some duplications of reports and data could well be eliminated. The Central Statistical Bureau has shown a willingness to take the initiative in seeing what can practicably be done in this respect."

The Committee adds that in the time since the January meeting of the House of Delegates, it "has unfortunately been unable to bring its studies in this field to the point of definitive recommendations. A useful function of your Committee during the coming year could well be the further examination of this subject and the formulation of specific suggestions for consideration."

The most timely new feature of the present report deals with the current problems of transient population and itinerant relief. "In its further studies of the problems of labor, employment and social security," says the report, "your Committee has been impressed with the significance and the consequences of the fact that there is in the United States an increasingly large floating population, which moves with seasons, weather, newspaper reports of the relief and social security policies of State and local governments, and the supposed opportunities for employment, particularly of an exigent character. In certain limited areas, the requirements for labor forces are considerably supplied by such transient workers. To an astonishingly large extent, however, such population remains unemployed, is in some degree unemployable, and in other respects is not in search of employment.

"California and Florida are familiar with the tremendous seasonal influx. They have sought by police measures to deal with the problems, but the numbers and the variety of human issues which are presented have stood in the way of solution by individual States. Every State has witnessed some phase or other of the problem. Large urban and industrial centers are plagued by it from one end of the year to the other. Unemployment and economic depression have greatly augmented the numbers, made more articulate their imprecations, emboldened their approaches.

"The 'wobbly' and the 'hobo' of the first decade of this century have thus grown into a social and economic problem of first rank. It needs, and in the opinion of your Committee should receive, careful study, census, and active attempts at solution.

"What can be done about it? Beginnings were made, during the early years of the present depression, in the establishment of transient camps with Federal funds. These were maintained throughout the country, under supervision of trained workers, by the Federal Relief Administration; and they were, in the short time of their existence, substantially successful in most or all instances—judging such success by appropriate social standards and giving due regard to the subject matter and possible attainment. Attendance or residence in such camps was voluntary, and work was exacted in exchange for maintenance. The camps were located at points where transients might logically pass, and where reasonably appropriate tasks could be assigned to the inmates. A transient could remain for one or two weeks, sometimes longer. He submitted to necessary medical and health treatment when diseased or ill; his clothes and body were sterilized ('deloused,' in colloquial usage); his history was ascertained, and in frequent cases rehabilitation was effected. It seems an unfortunate commentary on social thinking and social welfare administration that the Federal transient program was permitted to be liquidated. Com-

munity opposition had in large measure been overcome, and in many cases emergency services rendered by such transient workers had been of substantial value. New York State saw such benefits in the upstate flood areas a few years ago, when the camps were still in being.

"The problem is not local; it could not be confined, nor properly remitted, to any region or locality. Just as State lines cannot bar interstate trade and commerce, so the State, county or city boundaries do not and cannot stop the unemployed, unemployable, indolent, hobo or itinerant from traveling here and there across the country. Public health, public safety, crime prevention and labor standards make necessary a recognition of this problem. Preventive medicine in such matters demands some regulation of the transient population in the interest of National and local well-being. A continuous census of such persons, and some intelligent guidance of them, could be maintained through the prompt and permanent reestablishment of the Federal transient program. Such a program should be carefully, in the course of its operation, integrated with State and local welfare administration. The problem, however, is Nation-wide in scope and should be so treated. The dividends in National health and safety will repay its cost many times over.

"Inasmuch as the problems inherent in the transiency of unemployed population and the resulting itinerancy of relief and pressure for unemployment stipends belong in the field of social security and social welfare legislation, your Committee has deemed it appropriate that the National organization of the Bar shall state it for Nation-wide consideration. In its factual background and human factors, the problems are of course social, economic and humanitarian, rather than primarily legal; but their impact upon legislation and public policy is becoming so extensive that the matter should not be left solely to the earnest efforts of such organizations as the National Conference of Social Welfare Association."

No definitive recommendation for the action of the Association is made in the present report, which concludes by saying:

"Your Committee is of the opinion that the situation should not go unnoticed by the American Bar Association. It is a matter of rapidly increasing concern to many communities throughout the land. The large and increasing numbers of unemployed—in many instances unemployable or without desire to work—supply a great reservoir for malcontents, are a menace to public health and safety, endanger the operation of laws for social security and fair labor standards, and are a recruiting ground for disrespect for law and advocacy of subversive doctrines.

"The weight of public opinion throughout the United States should be placed behind a recommendation that the problem should receive early and thoroughgoing consideration and action by the Congress."

The report is signed by William L. Ransom, of New York, Chairman; Hedley V. Richardson, of Michigan; Clif. Langsdale, of Missouri; Henry Epstein, of New York; and Herman L. Ekern, of Wisconsin. Messrs. Langsdale and Ekern renew and re-state, in separate memoranda, their dissent from the recommendations as to the National Labor Relations Act, which were approved with substantial unanimity last January by the House of Delegates.

Report of the Standing Committee on Noteworthy Changes in Statute Law

This Committee's report, as in other years, contains a readable and significant review of the three or more "clearly discernible trends" revealed in the major statutory innovations, Federal and State, during the Association year. The Committee joins with its recent predecessors in suggesting that it be relieved of the duty of merely summarizing and stating the principal changes in statute law, as these are in large part already covered by Section and Committee reports in specialized fields.

The present report brings together and reviews interestingly the changes which have lately taken place, through (1) the growth of Federal influence and Federal-State cooperation in many fields; (2) the development of cooperation between the States in lieu of Federal action; and (3) the rise of competition, rivalry, and self-protective legislation, among the States. The repercussions of each of these upon the American form of government and the American way of life are set up with a detail and a vividness which will make this report valuable source material.

From its analysis of the current legislative trends, the following "significant features" are deemed by the Committee to "stand out":

"*First,* there is an increase in the tendency to substitute governmental regulation for individual freedom and self-sufficiency.

"*Second,* there is an increase in the tendency to have governmental regulation centralized in the Federal government.

"*Third,* to offset the need for this latter development and, perhaps, to combat the expansion of Federal authority while at the same time minimizing the undesirable diversity that might result from independent State action, there is a continuance of faith in the possibilities of uniform State legislation, an increased resort to interstate compacts and a new hope for interstate cooperation through the medium of the recently organized Council of State Governments.

"*Fourth,* in hostility to the second and third trends, there has been a revival of a policy of the States to foster local commerce and trade at the expense of competition from outside the bounds of that State."

As to present prospects for the continuance of these trends, the report concludes that:

"The Federal government's exercise of power to effect a centralization of regulatory authority, and the efforts of the States to protect their internal economy against outside competition are experiments forming a part of the strategy in the war against the depression. Whether either will survive a return to normal business conditions is speculative, but the former seems more likely than the latter to survive. There will probably be no relaxation of the exercise of the Federal power over interstate commerce as expanded by the Supreme Court's recent decisions in that field. Nation-wide and regional uniformity may, when needed, be accomplished through more effective organization for interstate cooperation and may remove the occasion for congressional solution of some of our problems."

This scholarly and useful report in furtherance of the Committee's lately changed concept of its function is submitted by Dean Robert S. Stevens of the Cornell Law School, as Chairman; William W. Dawson, of Ohio; Dean Alexander F. Ormsby, of New Jersey;

Dean Elmer N. Powell, of Missouri; and William C. Van Vleck, of Massachusetts and Washington, D. C.

Report of the Standing Committee on Legal Aid Work

This report is presented in six parts, each dealing with a phase of the activity of the Committee during the current year: first, certain outstanding events in the legal aid field; second, the routine work of the Committee; third, further consideration of the problem of legal aid in criminal cases; fourth, contacts established between the Committee and other groups within the American Bar Association; fifth, contacts established with State and local Bar Associations; and, sixth, plans for next year. The customary appendix sets forth the fundamental statistics concerning legal aid work for 1938.

Through some evident overlapping with studies conducted also by the Standing Committee on Jurisprudence and Law Reform, this Committee again discusses the "public defender" question, which was referred to this Committee by vote in the Assembly at the Cleveland meeting (1938 Annual Report, page 126 and following). After careful consideration of the whole matter, the Committee "reaffirms its position taken in 1937." (1937 Annual Report, page 714 and following). This year's report says, in part:

"Your Committee is not opposed to the *public* defender plan. When any community decides that it prefers that plan, the Committee will give all the encouragement and support that it can, and when any community decides that it prefers the *voluntary* defender, the Committee will give all the encouragement and support that it can.

"There is only one difference between Colonel Goldman and the Committee. He believes that the *public* defender plan is the only right and efficient plan. To approve his resolution is, by necessary implication, to disapprove the *voluntary* defender plan. That we cannot do. We believe both plans are laudable. In our opinion, the evidence does not support Colonel Goldman's contention that the public defender plan is necessarily best. In our judgment the work of the New York Voluntary Defenders Committee (a branch of the New York Legal Aid Society), and other similar privately supported agencies, is as effective in protecting the rights of indigent persons accused of crime as that of any public defender in the country."

The Committee does not re-submit its stated views on the "public defender" plan, for the action of this year's annual meeting. Meanwhile, the Standing Committee on Jurisprudence and Law Reform has submitted for action this year a recommendation "That the Association approves in principle the establishment of a system of public defenders in the Federal Courts," (Advance Program Pamphlet, page 31). In connection with this last quoted recommendation, the report by the Special Committee on Legal Aid Work should be noted.

This year's report is submitted by John S. Bradway, of North Carolina, Chairman; Edmund Ruffin Beckwith, Christopher M. Bradley, Beatrice A. Clephane, Reginald Heber Smith, Lane Summers.

Report of the Standing Committee on Commerce

The interesting report by this Committee deals first with the issues before the Temporary National Economic Committee and the recommendations of the Department of Justice meanwhile, in the field of "anti-trust" policy and legislation. As the work of the TNEC has not nearly reached definitive form, the Association's Committee makes no present recommendations on that subject.

The submission deals principally with a resolution introduced in the House of Delegates last January by E. Paul Mason, of Maryland, which was referred by the House to the Committee on Commerce for consideration and report. The resolution called attention to the fast multiplying number and variety of the State barriers to commerce among the States." In view of what it deems to be "the increasingly serious character of these obstructions," the Committee devotes its report largely to them.

"One of the principal benefits resulting from the adoption of the Constitution and Union of the States," says the Committee, "was the abolition of interstate tariffs and the establishment of free trade among the States. In comparatively recent years, however, as the production of goods became more highly specialized and the marketing system more complex, States and municipalities have enacted a greater number of laws and ordinances to protect the producer, the dealer and the consumer. No criticism, of course, can be leveled at the exercise of the police power of a State or city to properly safeguard its citizens, its commerce and its industries. Today, however, there exists a multitude of State laws, and local ordinances, which according to a recent report of the Department of Agriculture, may 'hamper commerce far more than help it.' The report states 'that the economic losses caused by laws and regulations that unduly restrict commerce . . . have been substantial.'

"Many of the States, particularly in the eastern part of the United States, have adopted legislation within the last two decades, designed primarily to protect the health of consumers of dairy products, and to stabilize the dairy industry and increase the purchasing power of local farmers. The report indicates the possibility that some of the States may have used such legislation in such a manner as to shut out dairy products, particularly milk, from other States.

"Motor vehicle regulations by States, especially the regulation of out-of-state motor trucks, is another problem which has arisen and which at present seems to impede commerce between the States. Licensing requirements and taxes, in many instances, are non-uniform and in some cases are said to be discriminatory. Another form of legislation designed to regulate motor trucks is that which establishes 'ports of entry.' Here State officials halt incoming traffic in order to subject motor vehicles to certain regulations, inspections and taxes. Special legislation with respect to margarine is a matter of common knowledge. At least half the States now have excise taxes on margarine; practically all States require the labeling of margarine packages. Some States require notification to all patrons of public eating places, and a few States even prescribe the labeling of dishes upon which margarine is served.

"This Committee is not condemning such State legislation. It simply points to existing conditions and notes that retaliatory legislation has arisen in other States whose producers believe themselves hurt by such legislation, until today the situation is described by one executive of a neutral State as 'the fantastic war between butter and oleomargarine.'"

The Committee notes that "One of the most im-

portant phases of the increasing trend toward the erection of State trade barriers grows out of the 21st Amendment"; and the Committee concludes from recent decisions that "each State virtually has unlimited authority to regulate the sale of intoxicants. . . While in many—and perhaps most—cases the various regulations which have been referred to, considered separately, are legitimate and proper police regulations and fully within the constitutional rights of the individual States, nevertheless their very multiplicity and variety may result in confusion. In some cases they may even result in retaliatory legislation, ill feeling, and a growth of sectionalism.

"Your Committee makes no recommendation as to what should be done to remedy this situation. Each phase of the problem of interstate barriers to trade may require its own treatment and solution. It is sufficient at this point to note the existence and seriousness of the problem; and the fact that it will probably receive consideration by Congress; and that many State legislatures are becoming actively concerned with the difficulties being experienced in this connection. The Council of State Governments has offered its facilities for negotiation and settlement of issues between States most vitally concerned.

"Your Committee believes it should undertake a further investigation of this subject with a view to making more specific recommendations at a later date."

The report is made by Donald R. Richberg, of Washington, D. C., Chairman; Ernest Angell, Thurlow M. Gordon, Oscar C. Hull, Jesse R. Smith, and Norman S. Sterry.

Report of the Section of Public Utility Law

With a membership of 925, the Section of Public Utility Law presents a one-page report, which chronicles the following subjects as having been studied and reported on by Committees of the Section during the year:

1. The effect of the decision of *Morgan v. United States*, 304 U. S. 1, upon the procedure of administrative tribunals.

2. The relation of recent federal legislation to the regulation of the transportation and distribution of natural gas.

3. The yearly report of the Standing Committee on Developments during the Year in the Field of Public Utility Law.

4. The application of labor laws to public utilities.

5. Bringing down to date and putting in final form a report on the simplification of holding company systems under the Public Utility Holding Company Act, a preliminary report having been presented at the 1938 annual meeting by the Honorable John J. Burns, former General Counsel of the Securities and Exchange Commission, Chairman of the Committee.

The reports have for the most part been printed and distributed to the members of the Section. As the principal purpose of the Section is better acquaintance and the interchange of views among the lawyers engaged in the practice of public utility law in the various public and private capacities, the Section follows its usual course of submitting no recommendations for the action of the Association. The report is submitted by Harold J. Gallagher, of New York, as Chairman.

Report of Special Committee on Customs Law

The banner for brevity is awarded to the report of the Special Committee on Customs Law. Having no matter at the stage of readiness for action, the Committee adopts the amazing course of saying so; it abstains from discussion for the sake of length. Within less than a page, this model report in full is as follows:

"Your Committee has been working during the year on an important matter involving the practice and rule-making power of the United States Customs Court. It has also been actively cooperating with the Directors of the Association of the Customs Bar in connection with proposed legislation affecting that Court. Neither of these matters has yet reached the stage where it can be considered as being in final shape for presentation to the House of Delegates.

"In the interest of economy of expenditures, and of personal effort by the officers and members of the House of Delegates, this Committee believes it inadvisable to present either of these matters before the annual or mid-year meeting of the House of Delegates."

The report is made by Albert MacC. Barnes, of New York, Chairman; Judge Frederick W. Dallinger, Joseph R. Jackson, Thomas M. Lane, and George R. Tuttle.

Report of the Section of Municipal Law

The report of the Section calls attention to the fact that the ever increasing concentration of population in cities and suburban areas "creates special legal problems, and new problems are continually appearing." The aim of the Section is stated to be "to interpret the rapidly evolving body of law, resulting from urban conditions: on the one hand to promote a better understanding of this branch of law by lawyers, and on the other to aid lawyers in guiding its development along sound lines."

During the present Association year, the Section has worked through twenty Committees, which fall into about eight groups. The work of each of these is reviewed in the report, which will be sent to all members of the Section.

Reference is made to the fact that the Section's Committee on Legal Remedies of Municipal Bondholders and Administrative Control of Municipal Reorganization, Edward J. Dimock, Chairman, has recommended a bill to amend the Federal Judicial Code so as to regulate proceedings in the nature of mandamus, for the enforcement of judgments against municipalities. The purpose of the bill is to confer clearly upon the Court in which any such proceeding may be brought, discretion to take into consideration the interests of the entire class of creditors of which the plaintiff is a member. The report recognizes that the bill has been attacked on the ground that it goes too far in depriving the diligent creditor of the fruits of his diligence, and the report announces that an opportunity for the presentation of both sides will be accorded in a forum discussion to be held under the joint auspices of the Section and the Committee on Jurisprudence and Law Reform at the forthcoming meeting of the Association.

Concerning a topic which has been widely discussed among lawyers during the current year, the report of the Section of Municipal Law says:

"Although the Association has a Committee on Civil Rights, and hence there is no committee of the Section on the subject, the regulation of the rights of free speech and free assembly in cities, requires mention in any survey of present problems in municipal law. The decision of the United States Circuit Court of Appeals for the Third Circuit in the case of Hague vs. Committee for Industrial Organization, et al., casts upon cities a duty to permit the reasonable use of public grounds such as parks for the holding of meetings and the making of speeches upon political, social and economic questions. The Court in the case mentioned, declares that the danger that hostile persons will seek to break up such meetings and that in consequence the meetings may lead to disorder, is no sufficient objection. It is for the police to protect peaceful meetings against such interference. * * *

"Whether or not the Supreme Court holds that the law goes as far as the decision of the Circuit Court of Appeals in compelling cities to provide opportunity for the assembling of the people on public grounds for purposes of discussion, such a provision may well be regarded as a sound and desirable policy for cities. Discussion is inevitable and much less dangerous when brought into the open than when suppressed. Furthermore discussion is the indispensable means of enlightenment and progress. As such it deserves affirmative provision on the part of cities. But the regulation of public meetings, particularly the police methods to be followed to prevent interference and disorder, is a problem which it is to be hoped the Association may assist in solving."

For the Section and its Council, the report is made by the Chairman, Henry P. Chandler, of Illinois.

Report of the Section of Patent, Trademark and Copyright Law

In the report to the 1400 members of the Section, the activities of the Section Council and Committees are chronicled, particularly those in relation to the patent legislation discussed before the Temporary National Economic Committee. Concerning the status of other matters which have been before the House of Delegates, the Section reports that following the action of the House of Delegates in Chicago, the Section Committee on Legislation has had a bill for a Classification Force in the Patent Office introduced in the House of Representatives by Chairman Sirovich of the House Committee on Patents, and this bill has been referred to that Committee, but as yet no hearings have been held thereon. The House of Delegates also authorized the Section Council to file a brief before the Supreme Court in a case involving R. S. 4886; but the case was heard so promptly that there was not sufficient time to prepare and file the brief. The Section Committee contented itself by having some of its members present in Court to listen to the arguments of counsel. When the opinion of the Court is handed down, the Committee will make a further report thereon.

The Section Committee on Legislation has also had one of its members attend the hearing concerning the bill for improving the administration of the Federal Courts. The Committee has also had members attend the hearings before the House Committee on Patents on the Lanham trade-mark bill, H. R. 4744. With the single exception of this trade-mark bill, the Section Committee took no part in the hearings, since the bill has never been considered by the House of Delegates, hence the Committee merely expressed the view of the Section on the retention of the remedy under R. S. 4915, the recommendation of the Section on this feature having been approved by the House of Delegates.

For the Section and its Council, the report is made by Thomas E. Robertson as Chairman.

Report of the Special Committee on Judicial Salaries

At the time of the preparation of the report, the legislatures of some twenty-nine States were in session, with a prospect that in some of them action would be taken for the better compensation of State Court judges. With manifest satisfaction, the Committee reports that already this year the salaries in Missouri for the Supreme Court have been raised from $7,500 to $10,000 and for the Court of Appeals from $6,000 to $8,500, and that Virginia has increased its Supreme Court salaries from $6,600 to $8,500 and the salaries of judges of the Trial Court from $4,500 to $5,400.

In North Carolina, the expense allowance for members of the Supreme Court has been enlarged from $500 to $1,500 and the retirement plan for judges in Virginia has been liberalized.

The Committee has continued its active efforts to disseminate information which is useful in the consideration of measures to provide more adequate compensation for judicial officers. It is reported that "Some interest has been displayed in the plans now operative in seventeen States whereby local communities, generally the county, may pay to a judge a salary in addition to that paid by the State." Such plans are stated to be especially adaptable for counties of large population and the most practical method of adjustment to increased cost of living.

The Committee reports that during the current year, special interest seems to have centered in judicial pensions and retirement plans. Twenty-two States now have statutes of this nature, and bills are pending in six additional States.

Concerning the work of the Association in behalf of increased salaries and security for State Court judges, the report says that

"This Committee holds that many of our State judges are underpaid and likewise do not have adequate security for future livelihood commensurate with the public service rendered. We believe this Association confers a true benefit upon society, looking toward the stability of our form of government, by encouraging proper judicial salaries and adequate pensions upon retirement after reasonable terms of service."

The Committee reports that it has given "serious consideration" to the "important assignment" voted by the House of Delegates last January, in declaring in favor of increased salaries for Federal judges and in asking the Committee to draft and submit a suitable bill to that end. Under the Committee's report, however, the matter will remain for the action of the House in San Francisco, and the Committee does not recommend present approval of the bill for general increases, drafted under the mandate from the House.

"The Committee is not agreed," says the report, "that now is a propitious time to promote increases in Federal salaries. It has been suggested that the need of Federal economy renders such a move of doubtful expediency; furthermore, due weight must be given to

the fact that Federal judges have a life tenure and are now under an excellent retirement plan.

"The House of Delegates apparently felt that all Federal judges should be increased but we respectfully suggest there would be much merit in a plan wherein some adjustment was possible to arrange additional compensation in those cities where the cost of living was manifestly greater."

The salaries now paid to Federal judges are:

Supreme Court	$20,000.00
Circuit Court of Appeals	12,500.00
District Court	10,000.00
Court of Appeals for the District of Columbia	12,500.00
Court of Claims	12,500.00
Court of Patent Appeals	12,500.00
District Court for the District of Columbia	10,000.00
Customs Court	10,000.00

The report reminds that in 1903 the Supreme Court salaries were $13,000 for the Chief Justice and $12,500 for Associate Justices; that in 1911 these figures were raised to $15,000, and $14,500 respectively, and that in 1926 the present scale was adopted of $20,500 for the Chief Justice and $20,000 for the Associate Justices.

The salaries of the Circuit Courts of Appeal were fixed at $7,000 in 1903, $8,500 in 1919, and $12,500 in 1926. District judges received a salary of $6,000 in 1903, which was increased to $7,500 in 1919 and to $10,000 in 1926.

The bill drafted by the Committee in order to present the matter for the consideration of the House of Delegates, but not recommended by the Committee, would provide for payment of the following Federal judicial salaries:

To the Chief Justice of the Supreme Court of the United States the sum of $27,500 per year, and to each of the Associate Justices thereof the sum of $25,000 per year.

To each of the Circuit judges the sum of $15,000 per year.

To each of the District judges the sum of $12,500 per year.

To the presiding judge of the Court of Customs Appeals, and to each of the other judges thereof, the sum of $15,000 per year.

To the Chief Justice of the Court of Appeals for the District of Columbia, and to each of the Associate Judges thereof, the sum of $15,000 per year.

To the Chief Justice of the Court of Claims and to each of the other judges, the sum of $15,000 per year.

To the Chief Justice of the District Court for the District of Columbia $13,500 per year, and to each of the Associate Justices thereof, the sum of $12,500 per year.

The report is signed by Walter S. Foster, of Michigan, chairman; Annette Abbott Adams, of Los Angeles, California; Alexander B. Andrews of North Carolina; Arthur W. Brouillet, of San Francisco, California; John D. Harris, of Florida; and Esmond Phelps of Louisiana—six of the seven members of the Committee. This report is not signed by Charles S. Reid, a recent member of the Committee, for the reason that he has been appointed Chief Justice of the Supreme Court of Georgia and upon receiving such appointment, withdrew from this Committee, in order that the policy of the Association might be continued of having a Committee on Judicial Salaries which includes no incumbent judge.

Report of the Special Committee on Administrative Law

With the amendments directed by the House of Delegates at its Chicago meeting on January 9th, the bill drafted by this Committee and reported by it to the Chicago meeting (See AMERICAN BAR ASSOCIATION JOURNAL for February, 1939; pages 113-118, 93-102), is pending in the 76th Congress as S. 915 and H. R. 4336. Appearances were made before the Committees to which the bills were referred. With amendments, The Senate Committee on the Judiciary has unanimously reported the Logan bill (S. 915). (See JOURNAL for June, 1939, p. 400).

The bill has been approved by the State Bar organizations of California, Colorado, Illinois, Nebraska, Ohio and Oregon, and by the local Bar Associations in Boston, Cleveland, Dallas and St. Louis. Many individual lawyers have written in support of the bill.

The report states that the National Lawyers' Guild and the Federal Bar Association—the latter being an organization affiliated with the American Bar Association, whose delegate opposed the draft at the Kansas City, Cleveland, and Chicago meetings of the House of Delegates—have both opposed the bill. It is further stated that "The Chairman of this Committee is a member of the Committee on Administrative Law of the latter Association and he wrote a dissenting report, disagreeing with the position taken by that Association, but the majority report was adopted on May 1, 1939, without the minority report having been read by the members or its contents otherwise made known to them. Action has been taken to bring the contents of both reports to the attention of the legal profession."

After consultation with the President of the Association the Committee decided that it should "concentrate on its efforts to secure enactment into law of the Administrative Law bill and to defer for the time being action on all other problems before the Committee.

In conclusion, the Committee's report to the San Francisco meeting states that—

"It should be said that with the enactment into law of the Administrative Law Bill, the present irritating procedure—as to which there has been much complaint—concerning the admission of attorneys to practice before the Federal administrative agencies, may be corrected under the rules of practice and procedure before all administrative agencies which the bill authorizes and requests the Supreme Court of the United States to issue."

The report is signed by O. R. McGuire, of Virginia, chairman; Walter F. Dodd of Illinois; Eugene L. Garey, of New York; Robert F. Maguire, of Oregon; and Julius C. Smith of North Carolina—the full membership of the Committee.

TOPICAL INDICES

A topical index of Vols. I to XXIII of the JOURNAL, covering the years 1915 to 1937, was printed in the Annual Report volume for 1937. Topical indices of the JOURNAL for subsequent years are in the Annual Report volumes.

News of the Bar Associations

Arkansas Bar Association Holds Annual Meeting at Hot Springs—President Collins Delivers Presidential Address — Round Table Discussion — Other Addresses — New Officers

THE Bar Association of Arkansas met in Hot Springs April 28-29, 1939. The Association is proud of the fact that it has held a State meeting each year since its organization in 1900.

The meeting was opened by A. D. Dulaney, of Little Rock, Chairman of the Executive Committee. Cooper Land, of the Hot Springs Bar, delivered a happy welcome address, which was appropriately responded to by C. R. Huie, of Arkadelphia, President of the Junior Bar.

Honorable Abe Collins, of DeQueen, President of the Bar Association, delivered an inspiring and constructive address, having for his theme "Looking Forward."

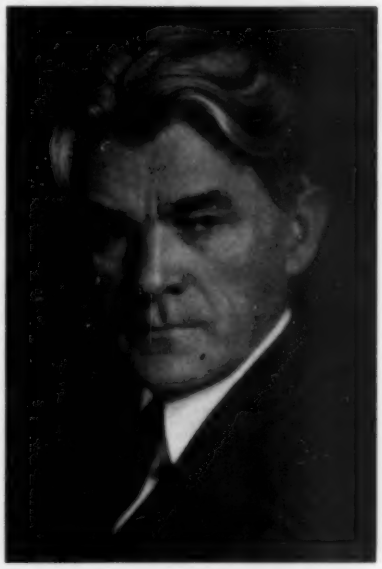
At the afternoon session, with C. R. Huie, President of the Junior Bar, presiding, Mr. La Vergne F. Guinn, of Dallas, Texas, delivered an excellent address on the subject "United We Stand, Divided We Fail." Professor Robert A. Leflar, of the Arkansas School of Law, delivered an informing and thought-provoking address on "The Future of Criminal Procedure in Arkansas." The remainder of the afternoon session was devoted to a round table discussion by Circuit Judges and Prosecuting Attorneys, led by Judge Gus Fulk, Presiding Judge of the First Division of the Pulaski Circuit Court, on the general topic "Constitutional Amendments and New Statutes Affecting Criminal Law."

At the annual banquet held Friday evening at the Arlington Hotel, Howard Cockrill, of Little Rock, presiding as toastmaster, Dr. Gus W. Dyer, of Vanderbilt University, spoke on "The Philosophy of the Constitution," an address that was packed full of sound political philosophy, savored with Attic salt.

In the forenoon of the second day Honorable R. Allan Stephens, of Springfield, Illinois, Secretary of the Illinois Bar Association, discussed, in an address abounding with practical suggestions, "State Bar Techniques." Judge Merrill E. Otis, of Kansas City, Missouri, United States District Judge, Western District of Missouri, delivered an address on "The Trial of Socrates", which was a classic composite of drama, eloquence and bright humor. The session was concluded with the reports of committees and the election of officers.

Harvey T. Harrison, of Little Rock, was elected President of the Association for 1939-40; N. J. Gantt, Jr., of Pine Bluff, Vice President; and Roscoe R. Lynn, of Little Rock, Secretary and Treasurer (reelected).

ROSCOE R. LYNN, Secretary.



HARVEY T. HARRISON
President, Bar Association of Arkansas

Illinois State Bar Association Holds Constructive Meeting —Model Institute on Trial and Appellate Practice— Symposium on New Trends in Law—Main Objectives for Coming Year

A MODEL institute on trial and appellate practice, spirited debate on many important measures now pending in the Illinois legislature, and a discussion program presenting outstanding speakers on a wide variety of subjects relating to progress in law and government featured the well-attended sixty-third annual meeting of the Illinois State Bar Association held at the Hotel Faust, in Rockford, Illinois, on May 24, 25 and 26, with President William D. Knight, of the same city, presiding. The Association of Wives of Illinois Lawyers held its annual meeting at the same time and place, marking its first anniversary as the only statewide organization for wives and daughters of members of the bar now in existence.

The institute on Illinois trial and appellate practice which opened the meeting on Wednesday afternoon, May 24, was designed to promote the American Bar Association project for more widespread development of this type of program among the local bar associations in smaller communities. All local bar association officers were given a special invitation to attend the institute, that they might acquaint themselves with the practical value of these programs and gain an insight into the technique of arranging and presenting institute sessions for their own members.

Circuit Judge Victor Hemphill, Carlinville, opened the afternoon session of the institute with a discussion of pretrial practice at present available under the Illinois Civil Practice Act, and its advantages in effecting reduction of litigation. Francis X. Busch, Chicago, then discussed trial practice problems from the point of view of the practicing attorney. Following an informal dinner, George I. Haight, Chicago, led a discussion of Illinois appellate practice with particular attention to the intermediate appellate courts, and Justice Paul Farthing, East St. Louis, of the Illinois Supreme Court, concluded the institute with a presentation of problems in Supreme Court practice and procedure. Both sessions of the institute attracted a large and enthusiastic attendance.

The opening business session of the convention, on Thursday morning, May 25, featured the annual address by the President, William D. Knight, Rockford, and the reports of officers, committees and sections for the past year. Benjamin F. Langworthy, Chicago, conducted a discussion of proposed cannons of judicial ethics as a part of the report of his Committee on Professional Ethics, during this morning program.

Thursday afternoon brought the first session of the general symposium on new trends in law presented by speakers provided by the various sections and committees of the Association. Morton John Barnard, Chicago, opened the dis-

cussion with a presentation of the pending revision and codification of the Illinois Probate Act. This was followed by a discussion of pending legislation affecting insurance law, by Chase M. Smith, of Chicago. Frank A. McCarthy, Elgin, and Judge John M. O'Connor, Chicago, then discussed informally the pending legislation to establish in Illinois a State Revisor of Statutes similar to that in Wisconsin and other states.

Following presentation of the provisions of the pending revision of the Illinois Mortgage Act, by F. Howard Eldridge, Chicago, and Theodore E. Kircher, Belleville, the program was interrupted by more than an hour's debate and discussion of the action of the Association's Board of Governors in voting approval in principle of this bill. This provided one of the most spirited sessions in the recent history of the Association and, upon showing that the approval by the board had been as to the general principle and not to specific details, the motion to withdraw this approval was formally tabled.

Continuing the symposium discussion, Ralph Horween, Chicago, discussed pending Illinois legislation relating to oil and gas law, and Robert S. Cushman and William F. Struckmann, both of Chicago, presented informally the recently enacted codification of the Illinois revenue act, and other tax legislation pending. The afternoon session concluded with a discussion of the pending Logan bill providing for regulation of federal administrative agencies, drafted by the Special Committee on Administrative Law of the American Bar Association, in which Marshall A. Pipin, Edward A. Haight, and Albert Langeluttig, all of Chicago, took part.

The annual dinner of the Association was held on Thursday evening, May 24, with President Harvey T. Harrison, Little Rock, of the Arkansas State Bar Association, as guest speaker for the occasion. Chief Justice Elwyn R. Shaw, Freeport, of the Illinois Supreme Court, and John E. Cassidy, Peoria, Attorney General of Illinois, likewise spoke briefly on the dinner program.

On Friday morning, May 26, the Committee on Legal History and Biography held a breakfast meeting at which Justice Francis S. Wilson, Chicago, of the Illinois Supreme Court, and Charles P. Megan, Chicago, former President of the Association and member of the Editorial Board of the AMERICAN BAR ASSOCIATION JOURNAL, discussed the work of that committee in compiling materials for a comprehensive history of Illinois courts and lawyers, with particular emphasis upon the Supreme Court and its influence on social, economic, and governmental progress. James G. Skinner, Chicago, chairman of the committee, presided.

CHARLES O. RUNDALL
President, Illinois State Bar Association

Continuing the symposium discussion of new trends in law on Friday morning, Caroll Teller, Chicago, opened the session with a presentation of the principal changes effected by the revised federal bankruptcy act. Hugh W. Cross, Jerseyville, speaker of the Illinois House of Representatives, and Barnet Hodes, Chicago, corporation counsel of the City of Chicago, then discussed current trends in taxation, followed by Frederic Burnham, Chicago, who discussed informally current trends in administrative law. The final speaker on the symposium was Edward C. Eicher, Washington, D.C., member of the federal Securities and Exchange Commission, who discussed the federal regulation of securities and the work of his Commission. The convention adjourned on Friday noon following a brief business session.

Social features of the convention program included the traditional law school alumni luncheons held on Thursday noon, and the annual golf tournament held on Friday afternoon. The Association of Wives of Illinois Lawyers held their annual business meeting on Thursday afternoon, and took part in a number of specially planned social events, including the informal dancing which followed the annual dinner program.

The annual election of the Association held at this time resulted in election of the following officers: Charles O. Rundall, Chicago, president; Albert J. Harno, Urbana, first Vice-President; Benjamin Wham, Chicago, second Vice-President; Charles E. Feirich, Carbondale, third Vice-President; R. Allan Stephens, Springfield, re-elected Secretary; Alvin C. Margrave, Springfield, re-elected Treasurer. John M. Niehaus Jr., Peoria, and Amos M. Pinkerton, Taylorville, retiring state chairman of the Junior Bar Conference, were elected to the Board of Governors for 3-year terms. Clarence W. Heyl, Peoria, and Cairo A. Trimble, Princeton, were re-elected as Illinois State Bar Association Delegates to the American Bar Association House of Delegates, with John R. Snively, Rockford, elected as the third representative for the 2-year terms to begin at the adjournment of the San Francisco convention.

Members of the Association of Wives of Illinois Lawyers elected the following officers for the coming year: Mrs. Charles O. Rundall, Chicago, President; Mrs. Albert J. Harno, Urbana, Vice-President; Mrs. Robert A. Stephens Jr., Springfield, re-elected Secretary; and Mrs. Alvin C. Margrave, Springfield, re-elected Treasurer.

President-elect Rundall lost no time in starting in on the work for the coming year. On Thursday morning, May 25, he met at breakfast with the committee and section officers recently appointed, for discussion of plans for the future, and on Friday noon, May 26, he held a luncheon conference with district and local bar association officers to plan the dates and program features for the annual meetings of the district federations of local bar associations to be held in September and October. In this way, the work of the Association continues without a break through the summer months, and the September meeting of the sections, to be held in Chicago, will find plans for the coming year well advanced.

The new President has already announced two major objectives for the coming year of his term in office, one the increase in membership of the Association by at least 2,000 new members, and the other the stimulation of local bar association activities through regional conferences of local bar association officers similar to those held throughout the country by the Section of Bar Organization Activities of the American Bar Association, for State Bar Association executives. Two of these conferences of local officers were held in April of this year, both being well attended and favorably commented on by the officers present. Wider developments of institute programs will be one of the principal activities discussed at these conferences.

R. ALLAN STEPHENS, Secretary

Kansas Bar Association Meeting Has Record Attendance —Junior Bar Conference—Important Section Meetings—Address on "The Bar Association Serves the Lawyers"—Speakers at Banquet

RALPH T. O'NEIL
President, Bar Association of the State of Kansas

THE Bar Association of the State of Kansas, a voluntary organization, with a membership of over two-thirds of the Kansas lawyers in active practice, held its Fifty-Seventh Annual Meeting in Topeka, on May 26th and 27th, with the largest registered attendance in the history of the organization.

Ralph T. O'Neil of Topeka was elected President for the coming year, and W. E. Stanley of Wichita, who is at present the Kansas delegate to the American Bar Association, and who is slated for President of the Kansas Bar Association next year, was elected first Vice-President. Bernard L. Sheridan, of Paola, was elected second Vice-President, and Robert M. Clark was elected to the office of Secretary-Treasurer.

The Kansas Junior Bar Conference held its Second Annual Meeting on Thursday afternoon and evening. The Thursday afternoon session consisted of a general business meeting which culminated in a banquet, with Ronald J. Foulis, Chairman of the Junior Bar Conference of the American Bar Association, as the principal speaker.

The morning of the 26th was devoted to section meetings on mineral law, insurance law, the probate code and the corporation code. The section meetings on probate code and corporation code were of especial interest because of the fact that the Kansas Legislature this spring passed new laws on both subjects. The new corporation code was drafted and sponsored by a committee of the Kansas Association.

The Friday afternoon meeting consisted of various committee reports, and was closed with an address by Mr. Ronald J. Foulis of St. Louis.

The high light of the social activities was the Annual Stag Show prepared and presented at a Topeka theatre by members of the Topeka Bar Association. The Show was entitled "Harmless Errors of 1939." The Show, which has now become an annual affair, is in the nature of a "frying pan," and has done much to stir up interest at the annual meetings of the Association.

The Saturday morning session included an address by Mr. Thomas McDonald, entitled "The Bar Association Serves the Lawyers." The rest of the day was devoted to a general business session, with selected committee reports, and closed with the election of officers.

The Association's Annual Banquet was held in the Florentine room of the Hotel Jayhawk, Saturday evening. Short addresses were made by the Hon. Inghram D. Hook, President of the Missouri Bar Association, and the Hon. Payne Ratner, Governor of Kansas. The main address of the evening, which was very entertainingly presented by Col. Harvey T. Harrison of Little Rock, Arkansas, closed the session.

ROBERT M. CLARK, Secretary

Louisiana State Bar Association Holds Forty-Second Annual Meeting—Addresses by Distinguished Visitors —Committee on Institutes Created—President Vernon Outlines Association's Activities

THE Forty-Second Annual Meeting of the Louisiana State Bar Association was held in the Bentley Hotel, Alexandria, Friday and Saturday, April 21st and 22nd, 1939. The meeting was well attended by members and their ladies.

Charles Vernon Porter, President, of the Baton Rouge bar, called the Convention to order and it opened with Invocation by Reverend J. Hodge Alves, of Saint James Episcopal Church, Alexandria.

The Association this year, was very fortunate in having the privilege of being addressed by three leaders of the American bar, outside of Louisiana. Honorable Frank J. Hogan, Washington, D. C., President of the American Bar Association, spoke on Saturday morning on the subject of "The Bar and The Public." His address showed it was the product of thought, study and care and was well received. Mr. William E. Stanley, Wichita, Kansas, Chairman of the General Committee on Advanced Legal Education of the Section of Legal Education of the American Bar Association, and Member of the Council of the Section on Bar Organization Activities of that Association, followed Mr. Hogan on the program and made a very interesting appeal for the upbuilding and promotion of bar associations in his address, "What Practical Value is a Bar Association to the Practicing Lawyer?"

Mr. Stanley, representing the American Bar Association, is advocating holding institutes under the auspices of the national Association in larger cities, or under the auspices of State Bar Associations in cities of their own states, for the purpose of instructing members of the bar with respect to modern developments in particular fields of the law in which they may be interested. He suggested, if the Association is inter-

EUGENE STANLEY
President, Louisiana State Bar Association

ested, that a Committee be appointed to start on a definite program of enlisting the lawyers who will conduct such institutes.

The recommendation of Mr. Stanley resulted in the Association authorizing its President to appoint a Committee on Institutes consisting of five members.

Mr. James A. Veasey, Washington, D. C., was on the program for Friday afternoon and gave the delegates a very instructive address on the "Problems of Statutory Well Spacing."

Two other noteworthy addresses were those by Dr. Harriet Spiller Daggett, a member of the Louisiana bar and a member of the law faculty of the Louisiana State University, on "Contemporary Issues in the Law of Oil and Gas," and Mr. Frank P. Stubbs, of the Shreveport bar, Assistant Trust Officer of the Commercial National Bank of Shreveport on "Louisiana Trusts For the Louisiana Lawyer: A Practical Survey of the New Statute."

Addresses of welcome were delivered on behalf of the City of Alexandria by Hon. V. V. Lamkin, Mayor, and on behalf of the Rapides Parish Bar Association, by Hon. H. H. White, Nestor of the Alexandria bar. The response to these addresses, on behalf of the visiting delegates of the Association, was made by W. C. Perrault, Esq. of the Opelousas bar.

The address of Charles Vernon Porter, President of the Louisiana State Bar Association followed the above. He gave a resumé of his observations and the Association's activities through his term of office. He said that "one of the most important events of the past year has been the founding and publication of the Louisiana Law Review by the Louisiana State University School of Law," and added: "If the high standard set in the first three numbers of that publication is maintained, and there is every reason to believe that it will be, the lawyers of Louisiana, as well as of the nation, will be immeasurably benefited by having another outstanding journal devoted primarily to the civil law of Louisiana. The Tulane Law Review has long since established a reputation for excellence, and it is believed that but few states in the Union, if any, can boast of two such splendid publications."

The President also referred to the establishment by the 1938 Legislature (Act 166) of the Louisiana State Law Institute, which he said promised great and lasting benefits to the public, and to the legal profession. He also referred favorably to the plan for the Association's Executive Committee to have its meetings in different parts of the State, which plan has been followed frequently during the past two years. He urged each member of the Association to help to increase its membership.

The key-note of the President's address was his reference to the two State Bar Associations now in existence in Louisiana, and the following is taken verbatim from his address:

"Despite any statements to the contrary, the Louisiana State Bar Association is definitely, in *no* sense a political organization. We have no political fences to build, or axes to grind, nor does the Association, as such, ever take part in the political campaigns in Louisiana. We should be and are vitally interested, however, in securing an amendment as soon as possible to the act creating the State Bar of Louisiana so as to make that body an *absolutely self-governing bar association.*

"In my opinion there is no serious objection to an integrated bar. Several of the states of the Union have integrated bars, and I understand that the results, in the main, have been fairly satisfactory. The State Bar of Louisiana, however, is anything but a self-governing body, and I am convinced that practically every lawyer in Louisiana, regardless of his political affiliations, and whether he admits it or not, *down in his heart, believes* that that provision of the State Bar Act requiring that the Board of Governors (which largely has control of your destinies and mine as lawyers) shall be elected by the qualified electors of the respective districts rather than by the lawyers, is a *vicious and totally unjustifiable one.* Nowhere else in the United States is such a system in vogue and with good reason! The fact that the American Bar Association has recognized the Louisiana State Bar Association as the official representative of the lawyers of Louisiana, and has refused to recognize the State Bar of Louisiana, should be convincing proof that certain provisions of the State Bar Act are offensive to the lawyers of this country and repugnant to every professional ideal. Certainly if doctors, dentists, bankers, butchers, bakers, plumbers, beauticians, chiropodists, candlestick makers, et al have the right to elect their own governing boards, we lawyers should also."

President Porter then referred to the efforts last year by the Executive Committee of the Louisiana State Bar Association to have the State Bar Act amended, and of its failure, and he said he was in favor of continuing the efforts to obtain the desired amendment.

He also advocated raising the educational and other standards of lawyers in Louisiana and seeing to it that only those who have the required intellectual and moral qualifications are admitted to the practice of law in Louisiana.

Amendments to Articles IV, V and VI of the charter of the Association were adopted. These have for their purpose changes in government and administration, including the reducing of membership dues.

W. W. Young, New Orleans, Secretary-Treasurer, presented his report, showing financial condition of the Association and its membership status, in detailed form.

Consideration of reports of Standing and Special Committees followed. One of the important features of the report of the Committee on Legal Education and Admission to the Bar, Edward Dubuisson, Chairman, was a resolution which was presented by it and unanimously adopted, disapproving of United States Senate Bill 1610, "To prevent discrimination against graduates of certain schools, and those acquiring their legal education in law offices, in the making of appointments to Government positions the qualifications for which include legal training or legal experience." The resolution carried with it the requirement that copies be sent to the two Louisiana Senators with a letter soliciting their support of the position taken by the Association.

Memorial Exercises in memory of the deceased members of the Association since the 1938 annual meeting were held, with Alvin O. King, Lake Charles, as eulogist.

A resolution was offered and unanimously adopted protesting against dictatorial powers now being exercised in Europe, copies thereof to be sent to the Secretary of State of the United States and to the Executive Secretary of the American Bar Association.

Many social features were offered and the meeting closed with a Banquet on Saturday night.

The officers elected for 1939-1940 under the new plan, resulting from the amendments to the charter, are:

Eugene Stanley, President, New Orleans; Pike Hall, Vice President, Shreveport; W. W. Young, Secretary-Treasurer, New Orleans; 1st Sup. Ct. Dist. for One Year, Eldon S. Lazarus, New Orleans; 2nd Sup. Ct. Dist. for Two Years, Charles L. Mayer, Shreveport; 3rd Sup. Ct. Dist. for One Year—Howard B. Gist, Alexandria; 4th Sup. Ct. Dist. for Two Years—W. H. Thompson, Monroe; 5th Sup. Ct. Dist. for One Year—Paul G. Borron, Baton Rouge; 6th Sup. Ct. Dist. for Two Years—James L. Helm, New Iberia.

The officers above named with the following four members, appointed by the President at large since the annual meeting, constitute the Executive Committee for 1939-1940, viz: Benjamin Y. Wolf, New Orleans; John J. McCloskey, New Orleans; W. Carruth Jones, Baton Rouge; Cullen R. Liskow, Lake Charles.

W. W. YOUNG,
Secretary

Massachusetts Bar Association Holds Twenty-Ninth Annual Meeting—"Integration of Bar" Discussed—General Subject of Rule-Making and Proposed Bill Considered — New Officers

THE twenty-ninth Annual Meeting of the Massachusetts Bar Association was held in the rooms of the Boston Bar Association in the Parker House, Boston, on March 23, according to the *Massachusetts Law Quarterly*. President Mayo presided.

The report of the Executive Committee particularly called the attention of the members to the related problems of finance and membership which have arisen during the depression period. It also stated that the committee had continued its study of possible methods of organizing or "integrating" the bar and, after a report by a special committee, had considered in detail and prepared a tentative draft of a set of rules for such organization to be submitted to the bar for discussion whenever the interest in this subject had reached a point which seemed to make such action worth while.

It also stated that a bill reviving the rule-making functions of the court had been prepared, circulated to all members of the Association, and submitted by correspondence to all the twenty-five members of the Executive Committee. Of the eighteen members heard from, seventeen had expressed approval of the bill in substance, accompanied in some cases with suggestions for slight changes in phraseology. It is still pending before the legislature.

After discussion of the problems of membership and finance, the Association voted that the Executive Committee be requested to consider the problems, with authority to take such steps as it deemed advisable for increasing the membership and, if necessary, to suspend or curtail such work of the Association as they deemed advisable.

This was followed by a discussion of the subject of the integrated bar, at the conclusion of which the members present voted "to renew the expression of faith in the proposal recommended by the Judicial Council . . . for the organization of all members of the bar of the Commonwealth by rule by the Supreme Judicial Court as a self-governing body subject to the constitutional authority of said court." The Executive Committee was authorized to take such action as it deemed advisable to call the matter to the attention of the bar for further discussion in order that there might be fuller understanding of the subject.

The general subject of rule-making and the proposed bill in regard thereto referred to in the Executive Committee's report were discussed at some length.

The Grievance Committee presented its report showing a total of 135 formal complaints of which only 7 were pending on December 31, 1938. It referred to the activities of Secretary Shafroth of the National Conference of Bar Examiners in the investigation of attorneys seeking admission to the bar of other states, and stated that during the year the Committee had furnished information on approximately 25 occasions.

JOSEPH WIGGIN
President, Massachusetts Bar Association

"The result of such work," the report continues, "will undoubtedly prevent a repetition of the experience of three or four years ago when a Massachusetts lawyer absconded with money which he held as a trustee and thereafter obtained admission to the bar in the states of Texas and Washington under assumed names and forged credentials from the Clerk of the Supreme Judicial Court of Massachusetts."

The following officers were duly elected for the year 1939: President, Joseph Wiggin of Malden; Vice President, Robert Grant of Boston; Treasurer, Horace E. Allen of Springfield; Secretary, Frank W. Grinnell of Boston; Members-at-Large of the Executive Committee—Morris R. Brownell of New Bedford; James N. Clark of Winchester; W. Arthur Garrity of Worcester; Robert E. Goodwin of Concord; Lispenard B. Phister of Boston; James M. Rosenthal of Pittsfield; and Romney Spring of Boston. The other members of the Executive Committee are the presidents, or other delegates, of fourteen affiliated associations.